FILED
SEP 30 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-362

INTERCOUNTY CONSTRUCTION CORP., and
HARTFORD ACCIDENT & INDEMNITY COMPANY,
Petitioners,

v.

NOAH C.A. WALTER, Deputy Commissioner,
U.S. Department of Labor,
Bureau of Employees Compensation,
and

MARY JONES,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Bureau of Employees Compensation,

and

MARY JONES,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Intercounty Construction Corporation and Hartford Accident & Indemnity Company pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on July 3, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto (1a-12a) as does the opinion rendered by the U.S. District Court for the District of Columbia. (13a)

JURISDICTION

The District Court had jurisdiction under 33 U.S.C. §921. The judgment of the Court of Appeals for the District of Columbia Circuit was entered on July 3, 1974, and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

When more than one year has elapsed between the date of last compensation payment and assertion of a claim for additional compensation under the Longshoremen's and Harbor Worker's Compensation Act, as made applicable to the District of Columbia, is the employee's claim for additional compensation barred by the 1-year statute of limitations provisions of the Act?

STATUTES INVOLVED

United States Code, Title 33:

§913. Time for filing of claims

(a) The right to compensation for disability under this chapter shall be barred unless a claim therefor is filed within one year after the injury, and the right to compensation for death shall

be barred unless a claim therefor is filed within one year after the death, except that if payment of compensation has been made without an award on account of such injury or death a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or such death occurred.

(b) Notwithstanding the provisions of subdivision (a) of this section failure to file a claim within the period prescribed in such subdivision shall not be a bar to such right unless objection to such failure is made at the first hearing of such claim in which all parties in interest are given reasonable notice and opportunity to be heard.

(c) If a person who is entitled to compensation under this chapter is mentally incompetent or a minor, the provisions of subdivision (a) of this section shall not be applicable so long as such person has no guardian or other authorized representative, but shall be applicable in the case of a person who is mentally incompetent or a minor from the date of appointment of such guardian or other representative, or in the case of a minor, if no guardian is appointed before he becomes of age, from the date he becomes of age.

(d) Where recovery is denied to any person, in a suit brought at law or in admiralty to recover damages in respect of injury or death, on the ground that such person was an employee and that the defendant was an employer within the meaning of this chapter and that such employer had secured compensation to such employee

under this chapter, the limitation of time prescribed in subdivision (a) of this section shall begin to run only from the date of termination of such suit.

March 4, 1927, c. 509, §13,44 Stat. 1432.

§921. Review of compensation orders

* * *

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the United States District Court for the District of Columbia if the injury occurred in the District). The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless upon application for an interlocutory injunction the court, on hearing, after not less than three days' notice to the parties in interest and the deputy commissioner, allows the stay of such payments, in whole or in part, where irreparable damage would otherwise ensue to the employer. The order of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court

and identified by reference thereto, that such irreparable damage would result to the employer, and specifying the nature of the damage.

§922. Modification of awards

Upon his own initiative, or upon the application of any party in interest on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case in accordance with the procedure prescribed in respect of claims in Section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the Secretary.

March 4, 1927, c 509, §22,44 Stat. 1437; May 26, 1934, c. 354, §5, 48 Stat. 807; June 25, 1938, c. 685, §10, 52 Stat. 1167.

District of Columbia Code:

§36-501. Longshoremen's and Harbor Workers' Compensation Act made applicable to District of Columbia.

The provisions of Chapter 18 of Title 33, U. S. Code, including all amendments that may hereafter be made thereto, shall apply in respect to the injury or death of an employee or an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term "employer" shall be held to mean every person carrying on any employment in the District of Columbia, and the term "employee" shall be held to mean every employee of any such person. (May 17, 1928, 45 Stat 600, ch. 612, §1.)

Effective Date

Section 3 of the Act May 17, 1928, provided that: "This Act [adding this section and section 36-502] shall take effect July 1, 1928."

STATEMENT OF THE CASE

On July 19, 1960, Charles E. Jones (hereinafter claimant or employee) was injured in the District of Columbia while working for Intercounty Construction Corporation (hereinafter employer) and on August 12, 1960, he filed a claim under the District of Columbia Workmen's Compensation Act, for workmen's compensation benefits, alleging permanent disability for said accident. (App. 2a) On August 23, 1960, Hartford Accident & Indemnity Company, the

workman's compensation for Intercounty (hereinafter carrier) filed an answer denying that the claimant was permanently disabled to the extent stated in his claim. (App. 3a) At the same time it filed a written notice with the Deputy Commissioner that payment of compensation had been begun without awaiting an award. (App. 3a) Compensation was then paid to the employee at the maximum weekly rate until April 20, 1965). (App. 3a)

On January 6, 1965, the carrier filed a written notice with the Deputy Commissioner that Charles Jones' claim would be controverted due to wages, extent of disability, and unauthorized medical care in St. Petersburg, Florida. (App. 3a) Additional compensation payments were paid by the carrier without an award for 50% temporary partial disability from April 21, 1965 until January 23, 1968. (App. 4a) On that date, the carrier filed BEC Form 208 indicating that compensation payments had been stopped since the statutory maximum of $17,280 under the District of Columbia Compensation Act had been paid (except for permanent and total disability). (App. 14a) Both the claimant and his attorney received a copy of said notice. (App. 16a) More than a year later, on February 11, 1970, Attorney Jefferson de R. Capps requested a hearing for compensation on a permanent total disability basis. (App. 16a)

Hearings were held on December 21, 1970, and January 14, 1971. (App. 4a) On May 24, 1971, respondent Noah C.A. Walter, Deputy Commissioner for the United States Department of Labor, Bureau of Employees Compensation, District of Columbia Compensation District, rendered a compensation order rejecting the claim of Charles E. Jones on the basis that more than one year had elapsed between the date of last compensation payment and the new claim

for permanent total disability advanced by the claimant's attorney. (App. 4a)

Suit was then filed by the employee to set aside the rejection of his claim in the U.S. District Court for the District of Columbia pursuant to 33 U.S.C. §921. (App. 4a) Counsel for the claimant and the defendant Deputy Commissioner eventually presented a consent order for remand to the court (the employer and carrier not being a party to the action), and the case was then sent back to the Deputy Commissioner for a further determination on the merits. (App. 4a) Pursuant to said remand on February 8, 1972, the Deputy Commissioner made an award for permanent and total disability to the claimant. (App. 4a)

Suit was then instituted by the employer and carrier, petitioners herein, in the U.S. District Court for the District of Columbia to set aside the Deputy Commissioner's second award, jurisdiction of said court being invoked under §33 U.S.C. §921. (App. 5a) On February 15, 1973, U.S. District Court Judge Aubrey E. Robinson, Jr., granted the carrier's motion for summary judgment, ruling that the 1-year statute of limitations in §22 of the Longshoremen's Act barred the employee's claim for additional compensation. (App. 13a) This ruling was reversed by the opinion of the United States Court of Appeals for the District of Columbia Circuit on July 3, 1974. The court expressly rejected a Fifth Circuit case on which the lower court relied, and the case was remanded back to the District Court for further proceedings, presumably for action on the other portions of the parties' cross-motions for summary judgment. (App. 12a)

REASONS FOR GRANTING WRIT

I. RESOLUTION OF CONFLICT BETWEEN FIFTH CIRCUIT AND DISTRICT OF COLUMBIA CIRCUIT

The decision of the United States Court of Appeals for the District of Columbia Circuit should be reviewed, not merely because it erroneously interprets the statute of limitations' provisions of the Longshoremen's and Harbor Workers' Compensation Act, as made applicable to employment in the District of Columbia, but because it is in direct conflict with the Fifth Circuit appellate decision of *Strachan Shipping Co. v. Hollis,* 460 F.2d 1108 (5th Cir. 1972), *cert. denied,* 409 U.S. 887, *reh. denied,* 409 U.S. 1002 (1972).

That the issues here are identical to the *Strachan* case, *supra,* is apparent from reviewing the August, 1972, memorandum from the Solicitor General's office in *Strachan, supra,* opposing the granting of certiorari. The memorandum there took express note of the instant case, but opposed the granting of certiorari in the absence of a conflict within the circuits. (App. 17a-18a)

The District Court here expressly relied and cited *Strachan, supra,* as being dispositive of the statute of limitations issue in its order. (App. 13a)

Moreover, the United States Court of Appeals panel, in its decision, did not attempt to distinguish *Strachan* but rather rejected the reasoning contained therein outright. (App. 10a)

II. UNIFORMITY OF ADMINISTRATION OF LONGSHOREMEN'S ACT

The statute of limitations issue presented by this case is one that extends significantly beyond the particular parties involved herein and has national import in the various compensation districts throughout the country where the Longshoremen's and Harbor Workers' Compensation Act is administered. If the conflicting view of the Fifth Circuit and District of Columbia Circuit remain without resolution, then uniformity in the administration of the Act will be jeopardized.

Although the appellate decision herein remanded the case for a consideration of other issues raised by the parties' District Court Motions for Summary Judgment, the matter is ripe for the granting of certiorari inasmuch as a favorable ruling for the employer and carrier in this case on the statute of limitations issue will be dispositive of the entire case.

III. PLAIN LANGUAGE OF STATUTE INDICATES STATUTE OF LIMITATIONS BARS CLAIM.

The sole question presented in this regard is whether Sections 13 and 22 of The Longshoremen's Act, where no final compensation order has been issued, bar a claim for additional compensation which has been filed more than one year after voluntary compensation payments have ceased. Petitioners contend that it does.

In *Strachan Shipping Co. v. Hollis,* 460 F.2d 1108 (5th Cir. 1972), *cert. denied,* 409 U.S. 887, *reh. denied,* 409 U.S. 1002 (1972), the employee filed his original claim for workmen's compensation benefits within one year from when he was disabled. During the ensuing years numerous

informal conferences were held, and intermittent voluntary compensation payments were made by the workmen's compensation carrier. No formal hearing was ever held nor any formal compensation order entered.

Approximately twelve years after the date of last compensation payment, the claimant submitted a second written claim and compensation benefits were awarded to him by the Deputy Commissioner, the carrier's contention that the claim was barred by the statute of limitations being overruled. In both the District Court (323 F. Supp. 1123 (S.D. Tex., 1970)) and appellate consideration of the statute of limitations problem, it was held that since the claimant had not filed his second claim within one year from the date of last compensation payment, further compensation was barred by Section 22 of the Act.

The Fifth Circuit pointed out that the Act reflected a legislative intention to encourage voluntary payment of compensation benefits and to discourage formal hearings. In addition to policy considerations and general congressional intent to secure voluntary compliance with the Act by the employers, the court also noted that the language of Section 22 triggering the one year limitation period from the date of last compensation payment was plain. Therefore, it dismissed the claim of the employee as having not been timely filed since more than one year had expired from the date of last compensation payment. Certiorari was denied by the Supreme Court.

There is other precedent similarly interpreting the statute of limitations. Note, for example, *O'Keeffe v. U.S.F. & G. Co.*, 338 F.2d 21 (5th Cir. 1964), which was a cursory *per curiam* affirmance of the lower court's decision. In *O'Keeffe* the employee received compensation benefits for his back claim both before and after his written claim was

filed, but no formal award of compensation order was ever issued nor formal hearing held by the Deputy Commissioner. A second written claim was made for additional compensation more than one year after the last date of compensation payment. That claim was held as barred by Section 22 of the Act. (App. 19a-24a)

In the unreported case of *Maryland Casualty Co. v. Britton,* U.S. District Court for the District of Columbia, Civil Action No. 14297 (1942), where an appeal was initially noted by the government, but abandoned, Justice Jennings Bailey held that §22 necessitated a reversal of the Deputy Commissioner who had awarded benefits. There a written claim was filed by the employee due to the traumatic amputation of a finger. No formal hearing was held or compensation order issued, but the carrier did make voluntary payments of compensation. More than a year after the last payment, another written claim was filed but the court ruled it was untimely under Section 22. (App. 25a-33a)

Of more recent vintage is a decision under the District of Columbia Workmen's Compensation Act from Administrative Law Judge William Naimark on April 26, 1973, in the case of *Jessie Harris v. Ceco Corp., et al.,* Case No. 73-DCWC-5. No appeal was taken from his determination by the employee or the Director, Office of Workers' Compensation Programs. That case involved a claim for additional permanent partial disability to the body as a whole which was filed more than one year after compensation payments ceased. The judge, retracing the statute and applicable precedent, concluded that the claim was time-barred. (App. 34a-42a)

The significance of the foregoing authorities and holdings is to show that the statute of limitations' provisions

under the Longshoremen's Act have long been regarded as being plain and have so been construed at all levels from administrative law judges (who try the claims), to District Court Judges (who used to initially review the propriety of the compensation orders) to the Court of Appeals. That proposition was considered well-settled until the decision in this case from the District of Columbia Circuit Court panel.

IV. LEGISLATIVE HISTORY INTERPRETATION INDICATES STATUTE OF LIMITATIONS BARS CLAIM

The clarity of the words of Section 22 and the foregoing decisions should make it unnecessary to examine the legislative history of §22; however, if one does undertake such an examination, it merely serves to bolster the plain import of the limitations language. Prior to 1934, §22 applied only to claims adjudicated by a final compensation order. The 1934 Amendment to §22, however, indicated a Congressional intent to change this result. The original and amended sections provided in pertinent part as follows:

> "Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions *or because of a mistake in a determination of fact by the deputy commissioner,* the deputy commissioner may, at any time [during the term of an award and after the compensation order in respect of such award has become final] *prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued,* review a compensation case in accordance with the procedure prescribed in

respect of claims in Section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase or decrease such compensation, or award compensation. . . ." [Additions to 1934 amendment italicized, deletions denoted by brackets.]

The impact of the 1934 Amendment is made clear by *American Mutual Liability Ins. Co. of Boston v. Lowe,* 85 F.2d 625, 627 (3d Cir. 1936). There, in considering whether the written claim of longshoreman Zagami, which had never been the subject of a formal compensation order was barred by §22, the Third Circuit compared §22's original language when the claimant was hurt in 1930 to the 1934 amendment which is applicable here. The court remarked, in holding the claim to be timely, that the 1934 amendment, which limited the deputy commissioner's power to . . . "at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued . . . review a compensation case," gave no indication of retroactivity and hence should not be so interpreted. Therefore, impliedly, if not expressly, the court suggested that a different result would pertain if the amendment which applies here controlled. Had this not been the case, there would have been no need to discuss it. Also see the same analysis in the lower court opinion in *Strachan Shipping Co. v. Hollis,* 323 F. Supp. 1122, 1125 (S.D. Tex., 1970).

The appellate decision here, however, in discussing *Lowe, supra,* disagreed and said, "the court did not say that the claim would be barred if no final order had been entered." (App. 11a). Yet the *Lowe* opinion, after holding that a Memorandum from the Deputy Commissioner was not a

final order and that the 1934 amendment was not retroactive, stated, "It follows that the claims existing at the date of the amendment were not thereby destroyed, and the time limitation therein prescribed began to run on the date of the enactment, May 26, 1934. *Sohn v. Waterson, supra.*" Thus the decision recognized that even where there was no final order, the statute of limitations under §22 applied; however, since the claimant's application for further consideration of his claim was filed on September 27, 1934, it was within a year and timely.

Reliance is also placed on *Lumber Mutual Casualty Ins. Co. of N.Y. v. Locke,* 60 F.2d 35 (2d Cir. 1932) (App. 11a), but that case is similarly inapplicable since it was a decision rendered under the original provisions of §22 requiring the issuance of a formal compensation order. Since the 1934 amendment, §22's time provisions apply whether or not a compensation order has been issued.

The opinion here also seeks to buttress its holding by seizing on the Title to §22, "Modification of Awards" as requiring the issuance of a compensation order before the time provisions begin to run. (App. 6a). First of all that was the heading when the statute was first enacted in 1927. Surely the failure to amend the title cannot invalidate the later changes in the text. Secondly an award is the correct term only when a claimant receives benefits. Where, as here originally, the claimant does not prevail, the Deputy Commissioner issues a "Compensation Order – Rejection of Claim for Additional Compensation." (App. 43a)

If the Court's theory is correct, then where no award is made and a claim rejected, the employee's only recourse would be for a judicial review, in accordance with 33 U.S.C. §921, and yet this Court has held that in such circumstances, resort can be had back to the Deputy Commissioner within

a year for presentation of new evidence even if it is not newly discovered. *O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 92 S. Ct. 405, 30 L. Ed. 2d 424 (1971).

V. NO LONG-STANDING AGENCY INTERPRETATION EXISTS

The panel opinion here also declares its refusal to set aside the Labor Department's settled interpretation of §22 which has stood for more than 35 years. (App. 11a) There is nothing contained in the record in this case to justify that such an interpretation exists other than the attachment to the concurring and dissenting opinion of Judge Ainsworth found in *Strachan, supra*, at 460 F.2d 1117. That letter from John E. Stocker, Assistant Director of the Office of Longshoremen's and Harborworkers' Compensation, dated August 6, 1971, was a boot-strapping effort undertaken *ex parte* on appeal since the decision being appealed from there was delivered on November 6, 1970.

In addition, if this interpretation was so well-settled, how does one explain the 1942 decision in *Maryland Casualty Co. v. Britton* (App. 25a-33a), the 1964 O'Keefe case (App. 19a-24a), the 1973 Harris case (App. 34a-42a), and the initial result reached by Deputy Commissioner Walter in this case? In *Harris*, for example, no appeal was taken by the Director of the Office of Workers' Compensation Programs, and yet 33 U.S.C. §921, and the regulations implementing same authorize the Director to appeal decisions which affect the general administration of the Longshoremen's Act. There are numerous cases decided by the Benefits Review Board, the initial reviewing body, where the Director alone has appealed such diverse general administrative matters as allowance and apportionment of

attorney's fees, timeliness of appeals, etc. Certainly, if administrative law judge Naimark was disturbing the long-standing traditional interpretation of the Act's statute of limitations, an appeal would have been taken.

Concerning the compensation orders issued by Deputy Commissioner Walter, (the first rejecting the claim as being untimely and the second finding permanent and total disability), the only reason the second order was even required was because Leavenworth Colby, the Justice Department attorney who answered the employee's District Court suit against the Deputy Commissioner, admitted basically every allegation of the complaint and endorsed a consent order remanding the case back to Mr. Walter for a determination on the merits. It did not reflect the Deputy Commission's "long-standing interpretation" but rather Mr. Colby's view – the same view which he had unsuccessfully urged in the appellate proceedings in *Strachan Shipping Co., supra.*

VI. DECISION IS CONTRARY TO AVOWED PURPOSE OF THE ACT

The effect of the panel opinion in this case is contrary to the announced purposes of the Act. Employers are encouraged to promptly make voluntary payments to injured employees without going through formal hearings, for in many areas the statute is almost self-executing. *Atlantic & Gulf Stevedores v. Donovan*, 274 F.2d 794 (5th Cir. 1960). Employers who follow that approach and voluntarily pay compensation benefits without an award or compensation order, however, will lose the protection of the limitations period, while those who contest liability requiring the issuance of a formal compensation order will enjoy that protection. *Strachan Shipping Co. v. Hollis*, 323 F. Supp. 1122, 1124 (S.D. Tex., 1970).

That the voluntary approach is both encouraged and utilized with no formal hearing is graphically demonstrated by the following statistics gleaned from annual reports of the Department of Labor which counsel has been able to obtain:

Year	"Final disposition of injury cases: Number of cases closed:"	"Formal Hearings Completed"
1961	96,154	436
1962	95,094	420
1963	114,657	459
1965	135,873	452
1966	139,349	371
TOTAL	576,127	2,138

These figures demonstrate that over 99% of the time claims were adjusted without the necessity of a formal hearing, and although in theory formal orders may issue without a formal hearing, the instances where this is done are statistically negligible. The point is that if the panel's decision here is adopted throughout the country, then for the 5-year period referenced above, there are potentially a half million claims where the limitations period has not even begun despite their being listed in the Labor Department's annual reports as being finally disposed of and closed.

The beneficient purposes of the statute are undisputed. As this Court, however, stated in *Pillsbury v. United Engineering Co.*, 342 U.S. 197, 201, 72 S. Ct. 223, 96 L. Ed. 225 (1952).

> ". . . We are aware that this is a humanitarian act, and that it should be construed liberally to effectuate its purposes; but that does not give us the power to rewrite the statute of

> limitations at will and make what was intended to be a limitation no limitation at all. Petitioners' construction would have the effect of extending the limitation indefinitely if a claim for disability had not been filed; the provision would then be one of extension rather than limitation. While it might be desirable for the statute to provide as petitioners contend, the power to change the statute is with Congress, not us."

A similar theme was sounded in *Strachan, supra:*

> "It may well be that our decision that the payment of September 3, 1957, was the "last payment" within the meaning of Section 22 of the Act (thereby triggering the one year limitations period with respect to modifications of compensation awards) will make it difficult for injured employees to obtain adequate compensation commensurate with the full extent of their physical disabilities. Should that eventuality occur, it would be for Congress either to lengthen Section 22's limitations period or to provide other means to postpone the running of the statute of limitations." 460 F.2d 1108, 1116 (5th Cir. 1972).

It is therefore significant that Congress recently embarked on a comprehensive overhaul of the Longshoremen's Act and yet left Section 22 intact. The various amendments to the Act were enacted on October 27, 1972, and became effective on November 26, 1972. The lower court opinion in *Strachan* was rendered on November 6, 1970, and the Court of Appeals affirmance was dated May 17, 1972. Since both the Assistant Director of the

Office of Longshoremen's and Harbor Workers' Compensation, United States Department of Labor, and the Special Assistant to the Attorney General were aware of that case, having been involved in same, and the Labor Department acted in an advisory capacity and participated in the drafting of this recent legislation, it can be assumed that either Congress was not dissatisfied with the court rulings interpreting Section 22 or in general it just declined to respond to invitations for change by the courts.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

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APPENDIX

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1569

INTERCOUNTY CONSTRUCTION CORPORATION
HARTFORD ACCIDENT & INDEMNITY COMPANY

v.

NOAH C. A. WALTER, DEPUTY COMMISSIONER, U.S. DEPARTMENT OF LABOR, BUREAU OF EMPLOYEES COMPENSATION, APPELLANTS

MARY JONES, INTERVENOR

Appeal from the United States District Court for the District of Columbia

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Judgment entered this date ←

Decided July 3, 1974

Leavenworth Colby, Attorney, U.S. Department of Labor with whom *George M. Lilly*, Attorney, United States Department of Labor was on the brief, for appellant. *Harold H. Titus, Jr.*, United States Attorney

at the time the record was filed and *Ellen Lee Park*, Assistant United States Attorney also entered appearances for appellant.

John C. Duncan, III, for appellees.

Maurice C. Goodpasture was on the brief for intervenor.

Before: LEVENTHAL and ROBB, *Circuit Judges* and SOLOMON,* *United States Senior District Judge* for the District of Oregon

Opinion for the Court filed by *District Judge* SOLOMON.

SOLOMON, *District Judge*: The issue presented in this appeal is whether an injured workman who filed a timely compensation claim and whose employer paid compensation without awaiting an award is barred by Section 22 of the Longshoremen's and Harborworkers' Act (Act), 33 U.S.C. § 922, from seeking additional compensation because he did not file a second claim within one year after his employer stopped paying compensation.

Charles E. Jones (claimant) was injured on July 19, 1960, while working for Intercounty Construction Corporation (employer) in the District of Columbia. On August 12, 1960, he filed a claim for permanent disability under the District of Columbia Compensation Act, 45 Stat. 600, 36 D.C. Code 36-501, with the deputy commissioner of the Bureau of Employee Compensation of the Department of Labor.[1] The claim was filed within

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

[1] The District of Columbia Compensation Act incorporates by reference the Longshoremen's and Harborworkers' Act, 33 U.S.C. §§ 901 *et seq.*, as amended. The deputy commissioners of the Bureau of Employee Compensation of the Department of Labor administer both acts.

the period permitted by Section 13 of the Act.[2] The employer's insurance carrier, Hartford Accident & Indemnity Company (carrier), filed an answer on August 25, 1960, admitting that claimant was injured in the course of his employment but denying that he was permanently disabled to the extent stated in his claim. The carrier[3] also filed a notice that it had started to pay compensation without awaiting an award by the deputy commissioner, a procedure required by Section 14(a)[4] of the Act when liability is not controverted. The claimant was paid $54.00 per week, the amount payable for total disability.

On January 6, 1965, the carrier filed a notice that it was controverting Jones' claim on the grounds of wages, extent of disability, and unauthorized medical care. On April 27, 1965, the carrier informed the deputy commissioner that it was reducing claimant's compensation to $27.00 per week, the rate for 50 per cent temporary

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[2] Section 13(a) provides:

TIME FOR FILING OF CLAIMS

Sec. 13. (a) The right to compensation for disability under this chapter shall be barred unless a claim therefor is filed within one year after the injury, . . . except that if payment of compensation has been made without an award on account of such injury or death a claim may be filed within one year after the date of the last payment.

[3] The term "carrier" shall include "employer" because in this case the interests of the carrier and the employer are identical.

[4] Section 14(a) provides:

(a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer.

partial disability.[3] On June 1, 1965, the deputy commissioner notified the claimant that if he wanted to contest the reduction in payments he should see an attorney. On August 26, 1966, a claims examiner held a hearing at which claimant was present. The conference was adjourned without any recommendation on claimant's renewed claim for total disability benefits.

On January 23, 1968, the carrier stopped paying compensation because it had paid claimant $17,280.00, its maximum liability for any condition other than total permanent disability. On February 11, 1970, claimant requested a hearing on his claim for total permanent disability. Hearings were held on December 21, 1970, and January 14, 1971. On May 24, 1971, Deputy Commissioner Walter entered an order rejecting the claim because the request for a hearing was made more than one year after the carrier's final payment. He held that the claim was barred by Section 22 of the Act, 33 U.S.C. § 922.

Claimant filed an action in the district court to challenge the decision. Shortly thereafter, the Bureau of Employee Compensation concluded that the deputy commissioner's decision was incorrect and agreed to a consent decree remanding the case to the deputy commissioner for further proceedings.[4] On February 8, 1972, the deputy commissioner entered an order awarding claimant compensation for permanent total disability.

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[3] The change from total permanent to temporary partial disability limited the carrier's liability. Under the Act the maximum payable for partial disability was $17,280.00. 33 U.S.C. § 914(m) (1960). There is no maximum liability for total permanent disability.

[4] Neither the employer nor the carrier were parties to the district court action and neither consented to the remand.

Both the employer and the carrier brought this action under 33 U.S.C. § 921(b) to enjoin the deputy commissioner from enforcing the order. The district court granted summary judgment against the deputy commissioner. It held that the claim was barred by Section 22 of the Act. The court relied on *Strachan Shipping Co.* v. *Hollis*, 460 F.2d 1108 (5th Cir. 1972) *cert. denied*, 409 U.S. 887 (1972).

The carrier did not request a hearing before the deputy commissioner during the lengthy administrative proceedings, nor did it ask the deputy commissioner to enter a final compensation order. No compensation order was entered prior to Deputy Commissioner Walter's order of May 24, 1971, which was superseded by his order of February 8, 1972.

Deputy Commissioner Walter appealed. Mary Jones, guardian of the incompetent claimant, intervened.

The basic time limitations on the filing of claims are embodied in Section 13 of the Act. which requires filing within a year after injury or after the last payment of compensation, if compensation has been paid without an award. A further time limitation on action by the Deputy Commissioner is contained in Section 22, which provides:

> Modification of Awards
>
> Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accord-

ance with such section issue a new compensation order . . . . Such new order shall not affect any compensation previously paid . . . .

The parties, like the Fifth Circuit in *Strachan Shipping*, have focused the issue almost exclusively on Section 22. We will consider the interpretation of Section 22, taking into account its purpose and legislative history. Nevertheless, we think it is important to stress the bearing of Section 13 on that interpretation, and to note that the claim of the injured employee was filed within one year of his injury as prescribed by Section 13. The issue for the court is not merely the meaning of Section 22 taken by itself, but the proper relationship of Sections 13 and 22 as elements of a sensible and coherent pattern of the statute as a whole.

The carrier contends that the order of February 8, 1972, was barred by the "plain language" of Section 22 because claimant did not request additional compensation until more than one year after the carrier stopped making compensation payments. The deputy commissioner contends that the time limitation in Section 22 applies only to the modification of a final order and does not affect his authority to issue an original order for a claim filed within the time permitted by Section 13.

The deputy commissioner's interpretation of Section 22 as applying only to a modification of a compensation order and not as an additional time limitation on the original filing of a claim is supported by the section's statutory title, "Modification of Awards",[7] and by its reference to an order issued under the section as a "new compensation order". These clauses indicate that the section applies to cases in which a compensation order has already been entered. Similarly, the inclusion of "a mis-

[7] An "award" is a payment made under a compensation order. 33 U.S.C. § 919(e) (1972).

take in a determination of fact by the deputy commissioner" as a ground for modification of an award implies that a prior compensation order has been entered, since findings of fact are required only in compensation orders. *See* 20 C.F.R. §§ 31.12, 31.13 (1972).

Nevertheless, there is language in Section 22 which is directed to a situation in which no prior final order has been entered. The section provides that the deputy commissioner may review a case "at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued . . . ." This passage could mean that Section 22 applies even if no compensation order has been entered, or that it applies regardless of whether an order has been entered as of "the date of the last payment of compensation". The reference to "a change in conditions" as a ground for modification of an award is also ambiguous. It could refer to conditions found by the deputy commissioner to exist in a prior compensation order, or it could mean conditions which existed when payments were made without awaiting an order.

Since the language of Section 22 is ambiguous, we must look to other sources to determine whether Congress intended the time limitation in section 22 to apply to cases in which no final order was made.

Section 22, as enacted in 1927, permitted the deputy commisioner to review an order "at any time during the term of an award and after the compensation order in respect of such award has become final . . . ." Act of Mar. 4, 1927, c. 509, § 22, 44 Stat. 1437. Because of administrative delays and the Act's emphasis on voluntary compliance, carriers often not only paid compensation but also completed making payments before an order was entered. The deputy commissioner was unable to change the amount due the claimant because the "term

of the award" had expired with the last payment by the carrier. United States Employees' Compensation Commission, Seventeenth Annual Report, at 18 (1933); *Mille v. McManigal*, 69 F.2d 644 (2d Cir. 1934); *F. Jarka Co., Inc. v. Monahan*, 29 F.2d 741 (D.Mass. 1928).

In its Seventeenth Annual Report, the United States Employees' Compensation Commission complained that "Section 22 of the Longshoremen's Act provides [the deputy commissioner] with less authority to do justice to the parties than is contained in any provision for a similar purpose in any State compensation law." *supra* at 18. The Commission recommended that Section 22 be amended to read as follows:

> Sec. 22 Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions, the deputy commissioner may at any time review a compensation order . . . [and] issue a new compensation order . . . , but such new order shall not affect any compensation paid or due under authority of the prior order. The power and jurisdiction of the deputy commissioner over each case shall be continuing, with authority, and after a hearing if applied for, to make such modification or change by a new compensation order whenever he may determine the interests of justice require a modification of an order formerly issued. *supra* at 18.

The Commission's reference to a "new order", "the prior order", and "modification of an order formerly issued" indicates that the Commission did not recommend that Section 22 be amended to apply to cases in which no final order had been entered.

In 1934, Congress amended Section 22 "to broaden the grounds on which a deputy commissioner can modify an award and also while strictly limiting the period, extend the time within which such modification may be made." H.R. Rep. No. 1244, 73d Cong., 2d Sess., April 16, 1934, at 4. The amendment was "in line with the

recommendation of the Commission except that it limits to 1 year after the date of the last payment of compensation the time during which such modification may be made." *Id.* The amendment deleted the original time limitation and substituted "at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued." The phrase "whether or not a compensation order has been issued" was intended to make clear that the deputy commissioner has the authority to modify awards, within the prescribed period, even in cases in which the original compensation order was issued after all payments have been made to the claimant. The amendment did not change the purpose of the section, which, according to the House Report, was to allow deputy commissioners to "modify an award".

In 1938, Section 22 was amended to permit the deputy commissioner to make an award in a case in which he had originally rejected the claim. Act of June 25, 1938, c. 685, § 10, 52 Stat. 1167. The House Report said that "[t]he purpose of this amendment is to extend to such cases the same provisions which now apply in connection with other cases *finally acted upon by the deputy commissioner.*" (emphasis supplied) H.R. Rep. 1945, 75th Cong., 3d Sess., March 14, 1938, at 9.

In our view, the legislative history shows that Congress intended Section 22 to apply only to cases in which the deputy commissioner had "finally acted" by issuing or denying a compensation order. The amendment was not intended to impose an additional time barrier to recovery by claimants who filed within the time permitted by Section 13, and were still awaiting an order on the filed application.

The Fifth Circuit came to the opposite conclusion. A divided panel of that court held in *Strachan Shipping Co. v. Hollis*, *supra*, that Section 22 barred timely filed

claims which were not refiled within one year after the last payment of compensation, even when no compensation order had been entered. The court did not discuss the legislative history and relied on the "plain language of Section 22". The *Strachan* majority said that:

> It would not be equitable, in our opinion, for courts to approve the deputy commissioner's vigorous efforts to secure voluntary compliance with the Act on the part of employers and their insurers while simultaneously approving the deputy commissioner's refusal to terminate compensation cases, by means of formal orders as envisioned in Section 22 of the Act, when voluntary payments are made.
>
> . . . .
>
> It may well be that our decision . . . will make it difficult for injured employees to obtain adequate compensation commensurate with the full extent of their physical disabilities. Should that eventuality occur, it would be for Congress either to lengthen Section 22's limitations period or to provide other means to postpone the running of the statute of limitations. 460 F.2d at 1116

We reject the reasoning of the Fifth Circuit. A carrier at any time can compel the deputy commissioner to hold a hearing on a pending claim and determine its liability within twenty days after the hearing. *See* 33 U.S.C. § 919(c); 5 U.S.C. § 706(1); *cf. Atlantic & Gulf Stevedores, Inc. v. Donovan*, 274 F.2d 794 (5th Cir. 1960). There is no inequity in continuing pending claims when the carrier can compel a prompt determination.

Here the carrier did not ask for either a formal hearing or the entry of a compensation order, even though such an order would have started the one-year period in which modifications are permitted by Section 22.

The *Strachan* majority did not follow a long-standing and rational interpretation of the Act by the agency charged with the administration of the Act. The regulation issued under Section 22, promulgated on May 31,

1938, interprets Section 22 as affecting only those cases in which a final order was entered; it does not refer to cases in which an order was not issued.[8] We are unwilling to join the Fifth Circiut in setting aside an agency interpretation that has stood for more than 35 years. *See* Ainsworth, J., concurring and dissenting in *Strachan, supra* at 1117; *see also Udall v. Tallman*, 380 U.S. 1, 16 (1965).

A timely filed claim remains pending until a compensation order is entered by the deputy commissioner. *See Lumber Mutual Casualty Ins. Co. of N.Y. v. Locke*, 60 F.2d 35 (2d Cir. 1932); *American Mutual Liability Ins. Co. of Boston v. Lowe*, 85 F.2d 625 (3d Cir. 1936).[9] Appellant argues that a claim is analogous to a complaint filed under the Federal Rules of Civil Procedure, which remains pending until disposed of by an order of court. We think the analogy has merit. It would be anomalous to require an injured workman to refile a claim in order to preserve his right to compensation when a plaintiff in a civil action does not have to refile his complaint in order to preserve his action. We also believe that such a requirement would contradict the statutory command that the deputy commissioner shall not be bound by "technical or formal rules of procedure" in proceedings under the Act. 33 U.S.C. § 923(a).

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[8] The regulation refers only to "application[s] . . . for modification of an award". 20 C.F.R. § 31.16(a) (1972).

[9] Appellees cite *Lowe* for the proposition that the one-year limitation in Section 22 applies regardless of whether a compensation order has been issued. The *Lowe* court said in dicta that a claim would be barred by Section 22, as amended in 1934, "if we assume that the memorandum . . . was a final order within the terms of the statute". The court did not say that the claim would be barred if no final order had been entered.

The Fifth Circuit's holding bars timely filed unadjudicated claims unless claimants file new claims within one year after their carriers stop paying compensation. Carriers may find it to their advantage to stop payments frequently in the hope that claimants not familiar with the agency's regulations would neglect to file another claim.[10]

The Longshoremen's and Harborworkers' Act "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *see B & P Steamboat Co. v. Norton*, 248 U.S. 408 (1932). It would be harsh and incongrous to force a claimant to refile an unadjudicated claim each time his carrier terminated payments to avoid having his right to compensation permanently barred.

We hold that Section 22 applies only to cases in which a final compensation order has been entered or denied. A claimant, in order to preserve his claim, is not required by Section 22 to refile his timely filed but unadjudicated claim after a carrier stops paying compensation.

All parties agree that appellees are liable for claimant's medical expenses.

The judgment of the district court is reversed. The case is remanded for further proceedings consistent with this opinion.

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[10] *See* letter from John E. Stocker, Assistant Director of the Office of Longshoremen's and Harborworkers' Compensation, to Leavenworth Colby, August 6, 1971, appended to the opinion of Ainsworth, J., concurring in part and dissenting in part in *Strachan, supra* at 1117.

In *Strachan* the carrier stopped paying compensation four times and stopped paying medical benefits twice during a fourteen-year period. Although the repeated termination of benefits in *Strachan* may not be typical, it does show that claimants may be forced to refile claims repeatedly if each termination starts the limitations period to run.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INTERCOUNTY CONSTRUCTION CORPORATION, *et al.*, *Plaintiffs*,	:	
v.	:	**Civil Action No. 297-72**
NOAH C.A. WALTER, Deputy Commissioner, *Defendant*.	:	

ORDER

Upon consideration of Plaintiffs' motion for summary judgment, Defendant's opposition thereto, and upon consideration of the entire record herein, it appearing to the Court that Section 22 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §922, is a bar to the jurisdiction of the Deputy Commissioner to enter the challenged compensation order herein, Strachan Shipping Co. v. Hollis, 460 F.2d 1108 (5th Cir. 1972), it is this 15th day of February, 1973.

ORDERED, that Plaintiffs' motion for summary judgment be and is hereby granted, and it is

FURTHER ORDERED, that Defendant be and is hereby permanently restrained and enjoined from carrying into effect any part of the February 8, 1972 order and award of benefits to claimant Charles E. Jones.

/s/ AUBREY E. ROBINSON, JR.
Judge

Dated: February 15, 1973

App. 14

BUREAU OF EMPLOYEES' COMPENSATION — WORKERS' COMPENSATION PROGRAM

COMPENSATION PAYMENT STOPPED OR SUSPENDED

1. BEC CASE NUMBER
2. CARRIER'S NUMBER 26

INSTRUCTIONS: This notice must be filed with the Deputy Commissioner within 16 days after stoppage or suspension of compensation. If payments have stopped temporarily, or are being resumed, and you intend to terminate payments shortly, or are continuing payments, so indicate in item 11, giving reasons.

3. NAME AND ADDRESS OF EMPLOYEE (Place address sticker here)

Charles E. Jones
2517 - 3rd. Avenue,N.
St.Petersburg, Florida 33713

D.C. exhibit NO 2

NOTE
Retain only copies 2 and 3.
Send copies 1, 4, 5, and 6 to the Deputy Commissioner who will forward employee's copies to him.

4. NAME OF EMPLOYER: Intercounty Construction Company
5. ADDRESS OF EMPLOYER: P.O. Box 329, Hyattsville, Maryland
6. DATE OF INJURY: 7/19/60
7. DATE EMPLOYEE FIRST DID NOT WORK BECAUSE OF INJURY: July 20, 1960
8. DATE PHYSICIAN FOUND EMPLOYEE ABLE TO RETURN TO WORK:
9. DATE EMPLOYEE RETURNED TO WORK:
10. (Maximum compensation rate—$70.00 per week) AVERAGE WEEKLY WAGE $ 81.00 MULTIPLIED BY 2/3 = COMPENSATION RATE $ 27.00 (50%)
11. GIVE REASONS WHY PAYMENTS HAVE BEEN STOPPED OR SUSPENDED: Carrier has paid $17,280.00 maximum payable under the D.C.Act for Temp. Total and Temp Part.
12. DATE OF THIS NOTICE: January 23, 1968
13. DATE LAST PAYMENT MADE: January 23, 1968

14. LIST ALL DISABILITY PAYMENTS

TYPE OF DISABILITY	FROM (Mo., day, yr.)	TO (Mo., day, yr., inclusive)	AMOUNT PAID PER WEEK	NUMBER OF WEEKS PAID	TOTAL
TEMPORARY TOTAL	7/20/65	1/20/65	$54.00	243 Wks.	$13,[illegible]
TEMPORARY PARTIAL	1/21/65	1/23/68	$27.00	114 Wks.	$3,[illegible]
*TEMPORARY PARTIAL					
PERMANENT PARTIAL (Non-scheduled)					
PERMANENT TOTAL					
*PERMANENT PARTIAL (Schedule loss, facial disfigurement)	PERCENT	PART OF BODY			
				TOTAL →	$17,[illegible]

*REPORT OFF THIS LINE PAYMENT FOR DIFFERENT PERIOD OR RATE THAN GIVEN IN PREVIOUS LINE

15. LIST ALL PAYMENTS MADE ON ACCOUNT OF DEATH

a. NAMES OF DEPENDENTS	b. AMOUNT	c. OTHER EXPENSES	d. AMOUNT
		FUNERAL EXPENSE	
		NO DEPENDENTS—PAID TO TREASURER, U.S.	
		TOTAL (Cols. b & d) →	

16. NAME OF INSURANCE CARRIER OR SELF-INSURED EMPLOYER
HARTFORD ACCIDENT AND INDEMNITY COMPANY

17. SIGNATURE OF PERSON AUTHORIZED TO SIGN FOR CARRIER: Richard W. Lindsey
18. TITLE OF PERSON WHOSE SIGNATURE APPEARS IN ITEM 17: Compensation Supervisor

CA SEC—324 (Rev. 1963)

1—DEPUTY COMMISSIONER

T-291 10

App. 15

Law Offices
of
JEFFERSON DE R. CAPPS
3440 FIFTH AVENUE NORTH
ST. PETERSBURG, FLORIDA 33713

TELEPHONE 813/894-4231

T-296 C 1+2 NS 11 7.

Mr. C. M. Moore
Claims Examiner
U. S. Bureau Employees Compensation
P. O. Box 35049
Jacksonville, FL 32202

Dear Mr. Moore:

Re: CHARLES E. JONES
Date of Injury: 19 July 1960
Inter-County Construction Corp.
File Nr. DCCA - 15144-42
Carrier's File Nr. 26 (Hartford Ins. Group)

Jefferson de R. Capps, Esq., as counsel for the claimant, CHARLES E. JONES, and KURT P. HAMPP, Esq., counsel for the carrier, HARTFORD INSURANCE GROUP, do hereby stipulate the following as to the above referenced claim:

1. The claimant, CHARLES E. JONES, claims 100% permanent total disability and inability to perform any gainful activity since 19 July 1960.

2. The deposition of ALFRED D. KOENIG, M.D., psychiatrist and neurologist, of St. Petersburg, Florida, may be taken by the claimant and the same is jointly stipulated into evidence for the formal hearing in this cause in lieu of the live testimony of this physician.

3. Currently, the claimant, CHARLES E. JONES, is receiving Veterans Administration and Social Security benefits for 100% disability which benefits are the claimant's only source of income.

4. The claimant, CHARLES E. JONES, duly filed his claim for permanent disability in the above cause with the Bureau on 18 August 1960.

5. The claimant, CHARLES E. JONES, received a copy of form entitled, "Important Notice to Employee", dated 27 April 1965 by carrier, setting forth that claimant had been paid temporary total compensation from 20 July 1960 to 28 April 1965 at $54.00 per week for a total amount paid of $13,392.00, and that claimant was ready for permanent rating.

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6. The claimant, CHARLES E. JONES, received a copy of form entitled, "Payment of Compensation Without Award", signed on 27 April 1965 by carrier, setting forth that claimant's weekly wage rate of $81.00 per week would for disability compensation purposes be $27.00 per week (50% of 2/3 of $81.00), said compensation to be paid from 21 April 1965 and commence on 4 May 1965.

7. The employer, through the carrier, filed an Important Notice to Employee, dated 23 January 1968, that as "Carrier has paid $17,280.00 maximum payable under the D.C. Act or (sic:"for") Temp. Total and Temp. Partial", last payment being made on 23 January 1968, payments were stopped or suspended by carrier. Further, that claimant received a copy of said notice.

8. All reports by all doctors as to examination or treatment of claimant shall be stipulated into evidence for the formal hearing in this cause, but carrier or claimant reserve the right to object to the conclusions that may be set forth therein.

9. Claimant acknowledges that the carrier objects to the affidavit of FREDERICK T. SHUE, dated 5 May 1970 filed with the Bureau by letter from claimant's attorney dated 9 July 1970.

10. Letter from Bureau of Disability Insurance, Social Security Administration, dated 2 November 1967, setting forth claimant's record of earnings credited to his social security account for years 1955 through 1960, the same being filed with the Bureau by letter from claimant's attorney, dated 3 April 1970, shall be stipulated into evidence for the formal hearing in this cause.

11. Claimant's attorney, Jefferson de R. Capps, first informed the Bureau that he represented claimant by his letter dated 2 December 1969.

12. Claimant's attorney, Jefferson de R. Capps, first requested hearing upon claimant's claim for compensation for permanent disability by letter to the Bureau dated 11 February 1970.

13. Claimant's attorney agreed to provide carrier's attorney of claimant's rehabilitation efforts since injury on 19 July 1960.

Dated: 15th September 1970

J. de R. Capps

JEFFERSON de R. CAPPS
Attorney for Claimant,
CHARLES E. JONES

KURT PRESTON HEADY
Attorney for Carrier,
HARTFORD INSURANCE GROUP

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n the Supreme Court of the United State.

OCTOBER TERM, 1972

No. 71-1624

MOSES LEWIS, JR., PETITIONER

v.

STRACHAN SHIPPING COMPANY and LEE H. HOLLIS, DEPUTY COMMISSIONER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT DEPUTY COMMISSIONER IN OPPOSITION

This case originated in a claim filed by petitione n 1956 against his employer and its compensation :arrier pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* In 1970, thirteen years after the last payment of :ompensation was made in 1957 pursuant to an informal agreement of the parties, the Deputy Commissioner entered a compensation order favorable to

petitioner. Petitioner now seeks review of the determination of the court of appeals that the one-year limitation provision of 33 U.S.C. 922 barred the 1970 order.

In both courts below, the government supported petitioner's contention that the one-year statute of limitations contained in Section 922 did not operate as a bar to entry of the 1970 compensation order. While the Department of Labor adheres to this position, we nevertheless do not believe that in the absence of a conflict between the circuits, review by this Court is warranted. (We note that a case involving the same issues raised here, *Intercounty Construction Corp.* v. *Walter*, Civil Action No. 297-72, is now pending in the District Court for the District of Columbia.)

For the foregoing reason, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1972.

July 10, 1957	– Accidental injury resulting in aggravation of spondylolithesis sustained by employee.
September 28, 1957	– Appellees paid eleven and one-seventh weeks of compensation to employee for period from July 11, 1957 to September 28, 1957, amounting to $411.12 (R. 111).
August 30, 1958	– Surgical treatment furnished to employee but no compensation paid.
September 26, 1958	– Compensation claim filed by employee with Deputy Commissioner.
August 26, 1959	– Final payment of compensation made to employee for period from September 28, 1957 to November 28, 1958, in the amount of $1,926.14, plus attorney fee of $275.00, to his attorney, for sixty-one and one-seventh weeks.
July 4, 1961	– Employee wrote a letter to the Deputy Commissioner (R. 150-152), which the Deputy Commissioner interpreted as a claim for compensation although not served on the appellees (R. 88).
August 17, 1962	– Additional surgical treatment furnished but no compensation paid.
October 11, 1962	– Another letter from the employee to the Deputy Commissioner (R. 154-155) which the Deputy Commissioner interpreted as a claim for compensation (R. 88).
February 21, 1963	– Deputy Commissioner entered award for additional compensation (R. 4-5).
February 28, 1963	– Complaint to suspend or modify the award filed by Appellees (R. 13).

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

FILED
OCT 3 - 1963
JACKSONVILLE, FLA.
JULIAN A. BLAIR
CLERK

UNITED STATES FIDELITY & GUARANTY COMPANY, a corporation, and GIBBS CORPORATION, a corporation,

Plaintiffs,

v.

No. 63-35-Civil-J

WILLIAM M. O'KEEFFE, as Deputy Commissioner United States Department of Labor, Bureau of Employees' Compensation, Sixth Compensation District,

Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND GRANTING PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS

After due notice, the motion of defendant for summary judgment was argued and submitted upon a complaint and its exhibits and the certified copy of the transcript of the proceedings held by the defendant, together with attached exhibits.

At the beginning of the hearing, plaintiffs filed before the Court a motion for judgment on the pleadings.

The arguments of counsel for the respective parties were by consent directed to both of said motions.

From the pleadings and the attached exhibits it appears that on July 10, 1957, an employee of Gibbs Corporation, Walter W. Williams, sustained an injury by accident which entitled him to compensation payments under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. § 901, et seq. Written notice of said injury was not given within thirty days, but a written claim for compensation was filed by the employee with defendant on September 26, 1958. Thereafter plaintiffs, without an award, paid compensation benefits found to be due said employee to and including November 28, 1958, and furnished medical treatment to him in accordance with the Act. Thereafter no further claim was made for compensation benefits until more than one year after the last payment of compensation.

A hearing was held by defendant at which plaintiffs objected to the claim on the ground that it had not been presented within one year after the last payment of compensation. The deputy commissioner nevertheless entered an award, which plaintiffs by this suit seek to vacate on the ground that the claim is barred by the limitation of one year.

Section 913(a) provides that "the right to compensation is barred unless a claim therefor is filed within one year after the injury, except

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". . . if payment of compensation has been made without an award on account of such injury . . . **a claim may be filed within one year after the date of the last payment.**" (Emphasis added)

Although a claim for compensation had been filed within one year after the injury, compensation was paid without an award for all of the disability claimed and sustained by the employee. This disposition of the claim by payment was reported to the employee by the defendant's letter of August 21, 1959. Carrier's Exhibit 7 at the hearing.

The right of the employee to any additional compensation then became subject to Section 922 of the Act which provides that upon the application of any party on the ground of a change in conditions the deputy commissioner may,

> ". . . at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued . . . review a compensation case in accordance with the procedure prescribed . . . " (Emphasis added.)

As no claim or application was presented by the employee within this one year period, he has no right under this section of the Act to claim additional compensation benefits. Section 914(h), which authorizes the deputy commissioner upon his own initiative in certain situations to hold hearings, does not permit such action to be taken after the claim is barred by the one year limitation. Ocean Accident & Guarantee Corp. v. Lawson, (CA 5th) 135 F. 2d 865; and Bajerczak v. B. H. Sobelman & Co., Pennsylvania, 89 F. Supp. 78, which

cites Lawson with approval. Nowhere in the Act is there any indication of an intent by Congress to permit a claim for compensation to be asserted later than one year after the last payment of compensation.

As there is no genuine issue as to any material fact presented and as it appears as a matter of law from the pleadings and the attached exhibits that plaintiffs are entitled to the relief prayed for in the complaint and that the award referred to in the complaint should be suspended and plaintiffs relieved from making the payments of compensation therein ordered to be paid, plaintiffs' motion for judgment on the pleadings should be granted. 3 Federal Practice and Procedure (Barron & Holtzoff), page 178; American Auto Ins. Co. v. Indemnity Ins. Co. of North America, 108 F. Supp. 221, affirmed 228 F. 2d 622; Carpineta v. Shields (Fla.), 70 So. 2d 573, 48 A.L.R. 2d 1185; 6 Moore's Federal Practice, Section 56.12, page 2088, 2089; Potomac Insurance Company v. Boles, 205 F. Supp. 879.

Upon consideration, it is

ORDERED AND ADJUDGED:

1. There is no genuine issue as to any material fact and plaintiffs are entitled to judgment on the pleadings as a matter of law.

2. Judgment is hereby entered in favor of plaintiffs and against defendant, and the award entered by defendant on February 21, 1963, awarding compensation to the employee, Walter W. Williams, is vacated and set aside, and defendant is ordered and directed to enter an award pursuant hereto vacating said award and entering an award denying the claim of the employee for compensation benefits.

3. Judgment on the pleadings having been granted against defendant and in favor of plaintiffs, the motion for summary judgment of defendant is denied.

DONE AND ORDERED at Jacksonville, Florida, this 3rd day of October, 1963.

Judge

Copies to all counsel

— BEST COPY AVAILABLE

IN THE DISTRICT COURT OF THE
UNITED STATES FOR
THE DISTRICT OF COLUMBIA

MARYLAND CASUALTY COMPANY, a body corporate, *Plaintiff,* vs. THEODORE BRITTON, Deputy Commissioner, United States Employees' Compensation Commission, District of Columbia Compensation District, and JOSEPH FRANCIS McFADDEN, *Defendants.*) Civil Action No. 14297

[Filed May 22, 1942]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action came on to be heard upon the joint Motion of the defendants to dismiss the Complaint for Injunction filed herein, and upon consideration thereof, the Court this 22nd day of May, 1942, makes and adopts the following:

FINDINGS OF FACT

That on August 8, 1936, Joseph Francis McFadden was employed by the Washington Times Herald as a Linotype operator; that the liability of said employer for compensation under the District of Columbia Compensation Act was at that time insured by the plaintiff, Maryland Casualty Company; that on said day while so employed said employee caught the second finger of his left hand in a Linotype

machine, as a result of which he suffered a traumatic amputation of the terminal phalanx of said finger, which injury resulted in temporary total disability for which said insurance carrier paid compensation to said employee in accordance with the provisions of the District of Columbia Compensation Act; that also as a result of said traumatic amputation, the employee sustained a 50 per cent loss of use of his finger for which, on November 10, 1936, said employee filed with the Compensation Commission a written claim for compensation and at the same time and on a form prescribed by the Compensation Commission pursuant to its long established practice and procedure, said employee also signed a written waiver of his right to a formal hearing and indicated his willingness to accept permanent partial disability compensation on the basis of a 50 per cent loss of use of the finger, to all of which said insurance carrier agreed; that said agreement was prepared, approved and accepted by one of the claims examiners acting on behalf of the Deputy Commissioner and thus established the extent of the loss of the finger; that on November 20, 1936, said claims examiner wrote a letter to said insurance carrier to pay additional compensation in the sum of $225, for said established 50 per cent permanent partial loss of the finger; that in said letter said claims examiner stated, "When payment has been completed, kindly furnish this office with Form DCCA308, on receipt of which the case will be closed"; that on January 4, 1937, said insurance carrier filed with the Deputy Commissioner a Form DCCA308, which showed a total payment to the employee of $532.25; that said amount was the sum of the temporary total disability compensation and the permanent partial disability compensation by reason of the 50 per cent loss of the finger; that neither the employer nor the insurance carrier had controverted the employee's claim and, in accordance with the established procedure, no formal award

was rendered; that on April 28, 1938, the employee complained that percussion of the digital nerve caused pain, whereupon the area was excised to relieve the discomfort; that by reason of this minor operation the employee suffered temporary total disability for five weeks, for which said insurance carrier voluntarily paid the employee, the last payment of compensation being made on May 27, 1938, and a Supplemental Form DCCA308 being filed by said insurance carrier on June 3, 1938, with the Deputy Commissioner; that on June 20, 1941, the employee again filed a written claim against the employer setting forth said injury which occurred in 1936, and further stating that on March 16, 1941, he had struck said finger on a steel frame; that said claim also stated that the entire finger had been amputated to relieve the employee of pain due to the sensitive condition of the stump; that said insurance carrier did not insure said employer during 1941, and no previous notice of the second alleged injury to the finger or the reamputation of the finger had been given said insurance carrier; that on June 25, 1941, said insurance carcier controverted the right of the employee to further compensation from it on the ground that no claim was made within one year from the date of the last payment of compensation and that no notice was given to it that the employee intended to have the entire finger amputated or that such amputation was necessary; that on November 23, 1941, a formal hearing of said claim was had before the Deputy Commissioner who, on December 19, 1941, filed a compensation order awarding compensation to said employee in which the Deputy Commissioner found the facts relative to the injury sustained by said employee to be, in part, as follows:

> . . . "that on the 2nd day of April, 1941, and again on the 12th day of June, 1941,

it was found necessary as a result of the condition known as 'snap joint' in the claimant's amputated second left finger to re-amputate the stump of the finger on the inner side of the proximal interphalangeal joint; that these re-amputations were necessary as a result of the injury of the 8th day of August, 1936, above described; that as a result of the re-amputations of April 2, 1941, and June 12, 1941, the claimant was wholly disabled from the 2nd day of April, 1941, to the 8th day of July, 1941, inclusive, a period of 14 weeks, and he is entitled to compensation at the rate of $25 a week in the amount of $350 for such temporary total disability; that as a further result of the said re-amputations the claimant has suffered the total loss of the remaining one-half (50 per cent) of his injured finger, and he is entitled to 9 weeks' compensation from the 9th day of July, 1941, to the 9th day of September, 1941, at the rate of $25 per week, amounting to $225, for such permanent partial disability, or a total of $575 as compensation for temporary total disability and permanent partial disability suffered subsequent to March 16, 1941, as a result of the injury of the 8th day of August, 1936; that the employer, Washington Times-Herald, and the insurance carrier, Hartford Accident and Indemnity Company, are liable only for the payment of compensation for the temporary total disability (1 week), which resulted from the injury of the 16th day of March, 1941, and that the employer, Washington Times-Herald, and the insurance carrier, Maryland Casualty Company, are liable for the payment of the remainder of compensation for the disability found above;" . . .

that during 1938 and continuously thereafter, said employee had knowledge of the nature and extent of the injury to

his finger, and knew that he had developed a condition known as "snap joint" in the proximal interphalangeal joint of the second finger of the left hand; which caused the finger to remain in an extended position most of the time; and that the employee did not within one year after the time he had knowledge of such condition apply to the Deputy Commissioner for a review of his compensation case.

CONCLUSIONS OF LAW

WHEREUPON, the Court concludes as a matter of law

1. That the findings of fact of the Deputy Commissioner in the compensation order filed December 19, 1941, complained of in the Complaint, including the findings of fact to the effect that the plaintiff is liable to pay compensation for temporary total disability and permanent partial disability by reason of the re-amputation of the second finger of the left hand, are as a matter of law not supported by competent and substantial evidence, and said findings of fact are, therefore, not in accordance with law.

2. That this case is governed by Sec. 22 as amended of the Compensation Act wherein it is provided that the Deputy Commissioner may at any time prior to one year after the last payment of compensation, whether or not a compensation order has been issued, review a compensation case and issue a new compensation order; that the employee did not ask for a review of his compensation case within one year after the last payment of compensation to him, nor within one year after the employee knew that he had developed a condition known as "snap joint" in the proximal interphalangeal joint of the second finger of the left hand, which caused the finger to remain in an extended position most of the time; that the employee's

application for compensation by reason of the ultimate loss of the entire finger was not timely made within one year, as provided by Sec. 22 as amended of the Compensation Act.

3. That by the filing of the employee's claim on November 10, 1936, and the simultaneous execution by him with the approval of the Compensation Commission of a written waiver, on a printed form prescribed and furnished by said Commission, of his right to a formal hearing and of his willingness to accept permanent partial disability compensation as therein stated, the amount and extent of the employee's disability thereby became established and fixed, and no formal award was necessary, the Compensation Act providing that "compensation under this Act shall be paid periodically, promptly, and directly to the person entitled, without an award, except where liability to pay compensation is controverted by the employer"; that thereafter if the employee suffered any change in his condition, then he should have complied with the provisions of Sec. 22 as amended of the Compensation Act, and that his failure to do so within one year from the date of the last payment of compensation by the carrier, barred the employee from any further right or claim to compensation.

/s/ JENNINGS BAILEY
Justice

No objection as to form.

/s/ BERNARD J. LONG,
Bernard J. Long,
Assistant United States Attorney,
Attorney for defendant Britton.

/s/ FRANK H. MYERS
Attorney for defendant McFadden.

[Filed May 11, 1943]

* * *

GREETING:

WHEREAS, lately in the District Court of the United States for the District of Columbia, before you or some of you, in a cause between Maryland Casualty Company, Inc., Plaintiff, and Theodore Birtton, Deputy Commissioner, United States Employee's Compensation Commission, District of Columbia Compensation District, *et al.*, Defendants, Civil Action No. 14297, wherein the order of the said District Court entered in said cause on the 22nd day of May, 1942, is in the following words, *viz:*

ORDER SETTING ASIDE AND ENJOINING ENFORCEMENT OF COMPENSATION ORDER

This cause having been heard upon the joint motion of the defendants to dismiss the complaint filed therein, and the Court having entered an order on April 20, 1942, overruling said motion, and it appearing to the Court that the defendants have declined to answer, or otherwise plead further to the complaint, and have elected to stand on the ruling upon said motion, it is, by the Court, this the 22nd day of May, 1942:

1. ORDERED, That the compensation order filed on December 19, 1941, by the defendant, Theodore Britton, deputy commissioner, awarding compensation to the defendant Joseph Francis McFadden, under the District of Columbia workmen's compensation law, be, and the same is, hereby set aside in whole, and it is further

2. ORDERED, That the defendants, Theodore Britton, deputy commissioner, and Joseph Francis McFadden, be,

and they are, hereby permanently restrained and enjoined from enforcing or attempting to enforce said compensation order, award of compensation, filed by the said defendant Britton as deputy commissioner, on December 19, 1941.

Jennings Bailey,
Justice

as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Court of Appeals for the District of Columbia by virtue of an appeal, agreeably to the act of Congress in such case made and provided, fully and at large appears;

AND WHEREAS, in the term of October , in the year of our Lord one thousand nine hundred and forty-two , the said cause came on to be heard before the said Court of Appeals on the said transcript of record, and on a motion to dismiss and was argued by counsel:

On consideration whereof, It is now here ordered and adjudged by this court that this cause be, and the same is hereby, dismissed for failure to take the appeal therein within the time prescribed by Rule 10 of this Court. See also Rule 32(b).

October 8, 1942.

YOU, THEREFORE, ARE HEREBY COMMANDED that such proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

WITNESS the Honorable HARLAN F. STONE, Chief Justice of the United States, the tenth day of May , in the year of our Lord one thousand nine hundred and forty-three.

/s/ JOSEPH W. STEWART

Clerk of the United States Court of Appeals for the District of Columbia.

[Filed May 11, 1943]

* * * *

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
WORKMEN'S COMPENSATION PROGRAMS

JESSIE HARRIS, *Claimant,* vs. CECO CORPORATION, *Employer,* GENERAL ACCIDENT FIRE AND LIFE ASSURANCE, *Insurance Carrier.*	:	**ORDER AND AWARD OF COMPENSATION** **Case No. 73-DCWC-5** **Formerly 40-05849**

Before: William Naimark, Administrative Law Judge

STATEMENT OF THE CASE

Pursuant to the Longshoremen and Harbor Workers' Compensation Act, the District of Columbia Workmens' Compensation Act, and the Rules and Regulations implementing the said statutes, a Notice of Hearing was issued on March 2, 1973 by the Chief Administrative Law Judge of the U.S. Department of Labor.

A hearing was duly held before me on March 21, 1973 at Washington, D.C. All parties were represented by counsel and were afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Thereafter the parties filed briefs which have been duly considered.

Upon the entire record in this case, from my observation of the witnesses and their demeanor, and from all the testimony and evidence adduced at the hearing, I make the following findings, conclusions, award, and order:

FINDINGS OF FACT

1. In June, 1966 the above-named claimant was in the employ of the employer herein, CECO Corporation, whose address is 1701 - 47th Avenue, Northeast, Washington, District of Columbia. The said employer was subject to the provision of an Act of Congress approved May 17, 1928, entitled "An Act to provide compensation for disability or death resulting from injury to employees in certain employments in the District of Columbia, and for other purposes." The liability of the employer for compensation under the said Act was insured by General Accident Fire and Life Assurance.

2. On June 8, 1966 the claimant, while performing his duties as a carpenter's helper, was hit by an iron pan which slipped out of another employee's hand as he attempted to throw the pan up to another level, and the claimant suffered an injury diagnosed on June 9, 1966 as blunt trauma to the abdomen with resultant anorexia of right lower quadrant.

3. At the suggestion of the employer the claimant on June 8, 1966 visited the Northeast Industrial Clinic, 1236 - 5th Street, Northeast, Washington, D.C., where his injury was misdiagnosed as acute appendicitis; and the claimant refused to submit to surgery as suggested by the physician at said clinic. The said physician advised claimant to seek medical treatment when he returned home to Baltimore, Maryland.

4. On June 9, 1966 claimant visited University Hospital, Baltimore, Maryland and was treated thereat for a muscle contusion.

5. Commencing on or about June 9, 1966 claimant, on his own initiative and with no consent from, or approval

by, the employer herein, commenced visits to Dr. Calvin P. Hornstein, a chiropractor in Baltimore, Maryland and from the aforesaid date until March 6, 1970 the claimant was treated by Dr. Hornstein, during which period claimant was x-rayed, as well as given examinations and therapy treatments for the injury sustained while working for the employer.

6. At no time since the injury on June 8, 1966 had the employer refused or neglected to furnish necessary medical services to claimant.

7. A thirty day written notice of the injury was given to the employer herein, and the claimant filed an "Employees Claim for Compensation" within one year of the date of the injury with the Bureau of Employees' Compensation, U.S. Department of Labor.

8. In accordance with the recommendation of the Bureau of Employee Compensation, the employer and the insurance carrier paid compensation to the claimant for 25 percent temporary partial disability from June 8, 1966 to September 2, 1966, inclusive, 12-3/7 weeks at the rate of $5.66 per week (66-2/3 percent of 25 percent of $34.02) in the amount of $70.35.

9. The sum of $34.02 was incorrectly stated as the average weekly wage of the claimant at the time of the injury.

10. The average weekly wage of the claimant at the time of the injury was $80.00.

11. The date of last payment made by the employer and the insurance carrier for temporary partial disability, as aforesaid, was October 27, 1967.

12. No further claim was filed by the claimant with the Bureau of Employees' Compensation, and the claimant has not filed a claim for additional or further compensation within one year from the date last payment of compensation was made to him by the employer and the insurance carrier herein.

13. Claimant continued to have pain in his right lower abdomen as well as his back. He seeks compensation herein from the employer and the insurance carrier for permanent partial disability from September 2, 1966 to the present time, as well as the payment by the employer and the insurance carrier of all medical treatment and hospital care secured by the claimant as a result of the injury.

CONCLUSIONS

1. The amount of $70.35 paid by the employer and the insurance carrier to the claimant for 25 percent temporary partial disability from June 8, 1966 to September 2, 1966, inclusive, 12-3/7 weeks, was incorrect since it was calculated on the basis of claimant's average weekly wage being $32.04. In view of the fact that claimant's average weekly wage at the time of the injury is found to be $80.00, the employer and the insurance carrier should have paid the claimant the sum of $165.67 as compensation for 25 percent temporary partial disability from June 8, 1966 to September 2, 1966, inclusive, 12-3/7 weeks at the rate of $13.33 per week (66-2/3 percent of 25 percent of $80.00). Accordingly, it is found that the employer and the insurance carrier are obligated to pay the claimant the amount of $95.32 which is the difference between the compensation due and owing him, $165.67, and the compensation already paid him, $70.35.

2. The medical treatment rendered by the University Hospital, Baltimore, Maryland to claimant on June 9, 1966 was emergency care required as a result of the injury to claimant on June 8, 1966. The claimant sought medical care on June 9, 1966 pursuant to the suggestion and advice of the physician at Northeast Industrial Clinic, Washington, D.C. which he attended at the instance of the employer herein. Moreover, the claimant's injury was misdiagnosed at said clinic. Accordingly, it is found that the employer and the insurance carrier are obligated to pay the cost of medical services rendered by the University Hospital, Baltimore, Maryland to the claimant on June 9, 1966.

3. The medical care and treatment rendered by Dr. Calvin P. Hornstein, chiropractor, to the claimant herein from June 9, 1966 to March 6, 1970 was not authorized or approved by the employer, nor did the claimant request authorization or approval from the employer to secure such care and treatment. Accordingly, and since the employer did not refuse to furnish necessary medical care and treatment, it is concluded that the employer and the insurance carrier are not obligated to pay the cost of medical services rendered by Dr. Calvin P. Hornstein, chiropractor, to claimant between June 9, 1966 and March 6, 1970.

4. Although claimant did file his claim within one year from the date of injury, he did not file a claim within one year from the date of last payment to him by the employer and insurance carrier. It is contended that (a) under the "notice to claimant" form he is instructed to file within one year after the date of injury *or* date of last payment of compensation, (b) that Section 22 of the Act, Title 33, U.S.C. 922, deals with modification of awards, and no such modification is sought here as claimant seeks a permanent injury award not heretofore made.

A claimant is required to file a claim within one year after date of last payment made to him, and he is not relieved of this requirement by having filed a claim within one year after the injury. The use of the disjunctive "or" in the notice to claimants must necessarily refer to the fact that claimant must file within one year of either event *as the case may be.* Section 913(a) provides that the right to compensation is barred unless a claim therefore is filed within one year after the injury. It also states that if payment of compensation has been made without an award on account of such injury, a claim may be filed *within one year after the date of the last payment.*

In *O'Keefe vs. Fidelity & Guaranty Co.* (CA5) 338 F.3d 21 (1964) compensation was paid to a claimant without an award. More than one year later a further claim was made for compensation. The court concluded the right of an employee to additional compensation is governed by Section 922, which provides that upon the application of a party based on changed conditions the Deputy Commissioner may review a compensation case *at any time prior to one year after the date of the last payment of compensation.* Since no claim was made by the employee within the one year period, the court concluded he has no right to claim additional compensation benefits.

It thus becomes clear that when a last payment is made by the insurer, it triggers the one-year limitation period with modification of compensation awards. The fact that payment was made in conformance with the recommendation of the claims examiner, as here, does not alter the fact that a claim must be filed within the one year period to obtain further compensation. *Stracham Shipping Co. v. Hollis* (CA5) 460 F.2d 1108 (1972). In rejecting a claim for additional benefits the court stated:

> "Nowhere in the Act is there any indication of an intent by Congress to permit a claim for compensation to be asserted later than one year after the last payment of compensation".

See also *Maryland Casualty Company v. Britton*, U.S. District Court for District of Columbia, No. 14297 (1942).

Claimant cites *Stancil v. Massey* 436 F.2d 274 (1970) as supporting his right to additional compensation where a claim was filed more than one year after the date of last compensation payment. But that case turned on the fact that the carrier's doctor advised claimant he had a mild back strain and was discharged from treatment. Claimant had, in reality, a herniated disc and the original diagnosis lulled him into "quiescence" since he considered himself not reduced in working power. That case, in my opinion, is distinguishable and does not, as the court says, alter the basic rule requiring the filing of a claim within one year after the date of last payment of compensation.

AWARD AND ORDER

1. The employer, CECO Corporation, and the insurance carrier, General Accident and Fire and Life Assurance, shall pay claimant, Jessie Harris, the amount of $95.32, that being the remaining sum due and owing claimant, not already paid, for 25 percent partial disability from June 8, 1966 to September 2, 1966, inclusive, 12-3/7 weeks, at the rate of $13.33 per week (66-2/3 percent of 25 percent of $80.00).[1]

---

[1] Claimant's counsel stated at the hearing he requested counsel fees only if the award for permanent partial disability was granted. Accordingly, no provision is made for counsel fees herein.

2. The employer and the carrier shall pay the cost of the medical treatment required and secured by the claimant at University Hospital, Baltimore, Maryland, on June 9, 1966.

3. IT IS HEREBY ORDERED that the claim for permanent partial disability from September 2, 1966 to the present date be, and the same hereby is, dismissed.

/s/ WILLIAM NAIMARK
Administrative Law Judge

Dated at Washington, D.C.
April 26, 1973

PROOF OF SERVICE

I hereby certify that a copy of the foregoing compensation order was sent by certified mail to the claimant, the employer, the attorney for the claimant and the attorney for the respondents at the last known address of each as follows:

NAME	ADDRESS
Jessie Harris	2466 Nevada Street Baltimore, Maryland 21230
Ceco Corporation	% General Accident Fire and Life Assurance 5454 Wisconsin Avenue, N.W. Washington, D.C.
General Accident Fire & Life Assurance	5454 Wisconsin Avenue, N.W. Washington, D.C.
Harvey Rosenberg, Esq.	1001 Spring Street Silver Spring, Maryland 20910

John C. Duncan, III, Esq.
Southern Building
Washington, D.C. 20005

/s/ JACK GARRELL
Deputy Commissioner

Mailed: May 3, 1973

UNITED STATES DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION
DISTRICT OF COLUMBIA COMPENSATION DISTRICT

In the matter of the claim for compensation under the District of Columbia Workmen's Compensation Act CHARLES E. JONES, *Claimant,* v. INTERCOUNTY CONSTRUCTION CORPORATION, *Employer,* HARTFORD ACCIDENT & INDEMNITY COMPANY, *Insurance Carrier.*	**Compensation Order** **Rejection of Claim for Additional Compensation** **Award of Medical Expenses** **Case No. 15144-49**

Such investigation in respect to the above-entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following:

FINDINGS OF FACT

1. That on July 19, 1960, the claimant above named was in the employ of the employer above named, whose address is 4744 Baltimore Avenue, Hyattsville, Maryland; that the employer was subject to the provisions of an Act of Congress approved May 17, 1928, entitled, "An Act to provide compensation for disability or death resulting from injury to employees in certain employments in the District of Columbia and for other purposes"; that the liability of the employer for compensation under the

said Act was insured by Hartford Accident and Indemnity Company;

2. That on the said day the claimant, while performing services for the employer as a pile driver at a jobsite in the District of Columbia,

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-362

INTERCOUNTY CONSTRUCTION CORP., and
HARTFORD ACCIDENT & INDEMNITY COMPANY,
Petitioners,

v.

NOAH C.A. WALTER, Deputy Commissioner,
U.S. Department of Labor
Bureau of Employees Compensation

and

MARY JONES,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI
FILED SEPTEMBER 30, 1974
CERTIORARI GRANTED JANUARY 20, 1975

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

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APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-362

INTERCOUNTY CONSTRUCTION CORP., and
HARTFORD ACCIDENT & INDEMNITY COMPANY,
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v.

NOAH C.A. WALTER, Deputy Commissioner,
U.S. Department of Labor
Bureau of Employees Compensation
and

MARY JONES,
Respondents.

**ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

**PETITION FOR WRIT OF CERTIORARI
FILED SEPTEMBER 30, 1974
CERTIORARI GRANTED JANUARY 20, 1975**

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

May 24, 1971 – Deputy Commissioner Walter's First Compensation Order Rejecting Claim.

February 8, 1972 – Deputy Commissioner Walter's Second Compensation Order Awarding Permanent and Total Disability.

February 17, 1972 – Employer and Carrier's Complaint to Enjoin Award.

February 25, 1972 – Answer of Deputy Commissioner Walter.

October 11, 1972 – Employer and Carrier's Motion for Summary Judgment.

November 20, 1972 – Deputy Commissioner's Motion for Summary Judgment.

February 16, 1973 – Order of District Court granting Employer and Carr's Motion for Summary Judgment.

June 21, 1973 – Order of Court of Appeals Permitting Intervention of Mary Jones.

July 3, 1974 – Opinion of Court of Appeals.

July 3, 1974 – Judgment of Court of Appeals.

DISTRICT OF COLUMBIA WORKMEN'S C[illegible] ON ACT

OFFICE OF DEPUTY COMMISSIONER
WASHINGTON, D.C.

D.C. [illegible]

Case No. [illegible]
Insurance Carrier's No. [illegible]

EMPLOYER'S CLAIM FOR COMPENSATION

(To be filed in duplicate with the Deputy Commissioner in accordance with sections 13 and 19 of the Act)

INJURED PERSON

1. Name of employee Charles Ernest Jones Employee's Check No.
2. Address: Street and No. 7010 Craig Street City or town Fort Pleasant
3. Sex Male Age 31 Married, single, widowed, or divorced
4. Are you a U. S. citizen? (Yes or No) yes Social Security No. 213-26-1829
5. State regular occupation piledriver
6. What were you doing when injured? working as a piledriver
7. (a) Wages or average earnings per day, $31.00 (Include overtime, board, rent, and other allowances.) (b) Per week, $182.00 (c) Were you employed elsewhere during week in which you were injured? no (d) If so, state where and when

EMPLOYER

8. Employer Inter-County Construction Corporation
9. Office address: Street and No. 4727 Baltimore Ave. City or town Hyattsville
10. Nature of business heavy construction

11. Place where accident occurred 2nd and N Streets, S. E., Washington, D. C.
(Give complete address or location)

THE INJURY OR DISEASE

12. Name of foreman
13. Date of accident or first illness, the 19th day of July, 19 60, at 3:10 o'clock P. M.
14. How did accident happen or how was occupational disease caused? Employee was standing on a metal slab to guide a piece of steel into place; due to the slack in the cable securing the slab he was caught off by the piece of steel
15. State fully nature of injury or condition. (Use other side if more space is required.)
He was knocked to the ground, body fell, head and fractured his skull in three places and sustained other injuries to his body.

EXTENT OF DISABILITY

16. On what date did you stop work as result of injury or disease? July 19, 19 60
17. Were you paid full wages for the day on which you stopped work? (Yes or No) yes
18. Have you returned to work? (Yes or No) no If "yes," on what date?
, 19
19. Does injury or disease keep you from work? (Yes or No) yes
20. Have you done any work in period of disability? (Yes or No) no
21. Have you received any wages since becoming disabled? no
If so, from and to what date?
22. Has injury or disease resulted in amputation or other permanent disability? yes
If so, describe same, if not apparent, and state extent as to arrival
23. Did you report your employer to provide medical attendance? yes Has he done so?
24. What is your claim for compensation for permanent disability

NOTICE

25. Have you given your employer notice of injury? (Yes or No) yes When?
July 19, 1960.
26. If such notice was given, to whom? Superintendent of Inter-County Construction Corp
27. What was the cause of failure?

I hereby make claim for compensation for the injury [illegible] under the Longshoremen's and Harbor Workers' Compensation Act, as amended by the [illegible]

Signed by [illegible]
Claimant.

Dated August 12, 1960. [illegible]

BEST COPY AVAILABLE

OFFICE OF DEPUTY COMMISSIONER
WASHINGTON, D. C.

Case No. .....
Insurance Carrier's No. .....

D.C. Exhibit No 6

ANSWER OF EMPLOYER OR INSURANCE CARRIER TO THE LONGSHOREMEN'S CLAIM FOR COMPENSATION

..., Claimant
vs.
..., Employer
..., Insurance Carrier

The employer or insurance carrier above named for answer to the claim respectfully shows:

1. It is {denied / admitted} that claimant sustained an injury on or about the date set forth in the claim.

2. It is {admitted / denied} that both the employer and employee were subject to the District of Columbia Workmen's Compensation Act at the time of the alleged injury.

3. It is {admitted / denied} that the relationship of employer and employee existed at the time of the injury.

4. It is {admitted / denied} that at the time of the alleged injury the employee was performing service growing out of and incidental to his employment.

5. It is {admitted / denied} that due notice of injury was given employer.

6. It is {admitted / denied} that claimant was permanently disabled to the extent stated in claim.

7. It is {admitted / denied} that claimant was temporarily disabled for the period stated in claim.

8. It is {admitted / denied} that the rate of wages as set forth in claim is correct.

9. .....

Signed .....

Note—... a copy of it is served ... claimant either personally or by mailing to the address given in the claim.

AUG 25 1960

D. C. C. ...

...ATION ACT

OFFICE OF DEPUTY COMMISSIONER
WASHINGTON, D. C.

Case No. ...
Insurance Carrier's No. ...

...REPORT TO DEPUTY COMMISSIONER OF ACCIDENT OR OCCUPATIONAL DISEASE

To be submitted in triplicate.

EASTERN CASUALTY AND INDEMNITY COMPANY, 1629 Vermont Avenue N. W., WASHINGTON 5, D. C.

D.C. Exhibit No 7

EMPLOYER

1. Employer's name Intercounty Construction Corporation
2. Office address P.O. Box 329 - Fayetteville, North Carolina
3. Nature of business Construction
4. ... (Whether agent, subcontractor, owner, lessee or hired contractor or employee of) ... 5. Where is carrier notified?

INJURED PERSON

6. Full name of injured person Charlie D. Jones — His check No. ...
7. Address (Street and No.) 7129 Dregg Ave., Glen Burnie, Maryland.
8. Sex Male Age ... Single or married? ... If not, what became of ...?
9. Injured person's regular occupation Pile Driverman
10. Was he injured in regular occupation? Yes If not, occupation when injured ...
11. Wages or average earnings per day, $ ... per week, $ $3.275 per hr. (Include overtime, bonuses, etc.)
12. Working days per week 5 (8 hr. day) Any other advantage? ...
13. Length of service in occupation one day Were full wages paid for day of injury? Yes

THE INJURY

14. Place where injury occurred D.C. Main Pumping Station Yard at Canal & 40th Street, S.E. Washington, D.C.
15. Name of foreman or supervisor Herbert Conrad
16. Date of accident or first illness July 19, 1960 (Month, day, year) Last day worked ... (Month, day, year)
17. When did you or your foreman first have knowledge of injury? Immediately
18. Describe in full how alleged accident occurred, or how employee was exposed to alleged hazard: The employee was on top of the steel sheet piling (15' up) getting ready to set another piece of sheet piling when he fell to the ground striking his head on a pile.
19. Machine, tool, or thing in connection with which accident or disease occurred ... (If machine, state make)
20. Nature of injury or occupational disease Fractured Skull etc. - Very Critical Condition. (State exactly the part of the person affected and the character of injury or disease)

NATURE AND EXTENT OF INJURY

21. Was accident reported to employer? ...
22. ... (Name and address of physician) ...
23. Did employee lose time as result of injury? ... If "yes", on what date? ...
24. Has employee returned to work? ... If "yes", on what date? AUG ...
25. Did employee die as result of injury? ... When? D. C. C. ...
26. ...
27. ...

Form Name: ... Date: July 20, 1960

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DISTRICT OF COLUMBIA WORKMEN'S COMPENSATION ACT

OFFICE OF THE DEPUTY COMMISSIONER
WASHINGTON, D. C.

Case No. ~~Penn. 25144-47~~
Insurance Carrier's No. 26

NOTICE TO THE DEPUTY COMMISSIONER THAT THE PAYMENT OF COMPENSATION HAS BEGUN WITHOUT AWAITING AWARD

(To be submitted in duplicate to Deputy Commissioner)

DC cash no 7

1. Name of employer Inter-County Construction Corp.
2. Office address P.O. Box 329 - Hyattsville, Maryland.
3. Name of injured person Charles E. Jones
4. Present address: Street and No. 7010 Gregg St., City or town Seat Pleasant, Maryland.
5. Date of accident or first illness 7/19/60, 19 Date disability began 7/19/60, 19 — no paid for this day
6. Compensation is to be paid to Charles E. Jones (Name of injured or deceased)
7. Average daily wage $ ..... multiplied by ..... = $ ..... divided by 52 = average weekly wage $55.00 multiplied by 2/3 = compensation rate $ 36.00 (Maximum compensation limit $25 per week)
8. Compensation shall be payable from the 20th day of July, 19 60 until notice is given the Deputy Commissioner that payment has been stopped or suspended.
9. Date of first payment 8/22/60, 19

Name of Insurance Carrier Hartford Accident & Indemnity Company

Signed by Walter C. Richard

Dated 8/22/60, 19 Official title Milton C. Forcher, Adj.

Copy of this form as completed to be given to person to whom compensation is paid at time of first payment.

RECEIVED
AUG 23 1960
D. C. C. A.

Form LC-262 Printed in U. S. A.

DISTRICT OF COLUMBIA WORKMEN'S COMPENSATION ACT

OFFICE OF DEPUTY COMMISSIONER
WASHINGTON, D. C.

Case No. 25144-49
Insurance Carrier's No. 26

NOTICE TO THE DEPUTY COMMISSIONER THAT CLAIM WILL BE CONTROVERTED

(To be submitted in duplicate to Deputy Commissioner)

NOTE.—This form must be completed and filed with the Deputy Commissioner on or before the 14th day after the employer has knowledge of the alleged injury or death, in all cases where the right of the injured to compensation is controverted.

CA No 47

1. Name of employer Intercounty Construction Company
2. Office address: 3414 Baltimore Avenue, Hyattsville, Maryland
3. Name of injured person Charles E. Jones
4. Present address: Street and No. 2546-1st. Ave. So. City or town St. Petersburg, Florida
5. Date of alleged accident or first illness July 19, 1960, 19 , M.
6. Nature of alleged accident or occupational disease On top of steel piling getting ready to set another piece of sheet piling when he fell to the ground rupturing his head on a valve.
When was notice of injury received from employer? August 13, 1960, 19
7. This case will be controverted for the following reasons:
   (a) For weekly wage? I
   (b) For rate of compensation?
   (c) For period of disability?
   (d) If controverted for any other reason, full statement thereof is required below.
   (1) Wages.
   (2) Extent of Disability.
   (3) Unauthorized medical care in St. Petersburg, Florida.
9. Do you believe the controversy can be settled by conference without the necessity for sworn testimony? (Yes or No)

Name of Insurance Carrier Hartford Accident & Indemnity Company

Signed by Edward M. Brady

Dated Jmuary 6, 1965 Official title Richard C. Francis

RECEIVED
JAN 7 1965
D. C. C. A.

Form LC-262 Printed in U. S. A.

BEST COPY AVAILABLE

BUREAU OF EMPLOYEES' COMPENSATION

FEDERAL EMPLOYEES COMPENSATION PROGRAM

COMPENSATION PAYMENT STOPPED OR SUSPENDED

1. B.E.C. CASE NUMBER 15144-19 Tr.27
2. CARRIER'S NUMBER 26

NAME AND ADDRESS OF EMPLOYEE (Number and street, city, State, and ZIP code) D.C. No 16.

Charles E.Jones
2546-1st. Avenue, South
St.Petersburg, Florida

NOTE
Retain only copies 2 and 3.

Send copies 2, 4, 5, and 6 to the Deputy Commissioner who will forward employee's copy to him.

4. NAME OF EMPLOYER: Intercounty Construction Company
5. ADDRESS OF EMPLOYER: P.O. Box 329, Hyattsville, Maryland
6. DATE OF INJURY: 7/19/60
7. DATE EMPLOYEE FIRST DID NOT WORK BECAUSE OF INJURY: 7/20/60
8. DATE PHYSICIAN FOUND EMPLOYEE ABLE TO RETURN TO WORK
9. DATE EMPLOYEE RETURNED TO WORK
10. AVERAGE WEEKLY WAGE $ 82.00 (Maximum compensation rate—$70.00 per week) MULTIPLIED BY 2/3 = COMPENSATION RATE $ 54.00
11. GIVE REASONS WHY PAYMENTS HAVE BEEN STOPPED OR SUSPENDED: Compensation cont. Claimant is ready for permanent rating.
12. DATE OF THIS NOTICE: April 27,1965.
13. DATE LAST PAYMENT MADE: April 20, 1965.

LIST ALL DISABILITY PAYMENTS

14. TYPE OF DISABILITY	15. FROM (Month, day, year)	16. TO (Month, day, year)	17. AMOUNT PAID PER WEEK	18. NUMBER OF WEEKS PAID	19. TOTAL
TEMPORARY TOTAL	7/20/60	4/25/65	$54.00	253 wks.	$13,662.00
TEMPORARY PARTIAL					
TEMPORARY TOTAL*					
PERMANENT PARTIAL (Schedule)					
PERMANENT TOTAL					
PERMANENT PARTIAL (Schedule—loss or loss of use)	FINGER	PART OF BODY			

*REPORT ON THIS LINE PAYMENT FOR DISABILITY LASTING FOR LESS THAN ONE FULL WEEK OR LESS THAN ONE FULL DAY. TOTAL ——→ $13,662.00

LIST ALL PAYMENTS MADE ON ACCOUNT OF DEATH

a. NAMES OF BENEFICIARIES	b. AMOUNT	c. OTHER EXPENSES	d. AMOUNT
		FUNERAL EXPENSE	
		NO. DEPENDENTS—PAID TO DATE $	
		TOTAL (Sum of b and d) ——→	

20. NAME OF INSURANCE CARRIER: HARTFORD ACCIDENT AND INDEMNITY COMPANY

21. SIGNATURE OF PERSON MAKING THIS REPORT: Richard H. Smith
22. TITLE OF PERSON WHOSE SIGNATURE APPEARS IN ITEM 21: Claims Supervisor

CA-7
1—DEPUTY COMMISSIONER

BUREAU OF EMPLOYEES' COMPENSATION

FEDERAL EMPLOYEES COMPENSATION PROGRAM

Tr.27

PAYMENT OF COMPENSATION WITHOUT AWARD

1. B.E.C. CASE NUMBER 15144-19
2. CARRIER'S NUMBER 26

NOTE. This notice is to be filed with the Deputy Commissioner when the first payment is made. Copy should be sent to the person to whom compensation was paid.

3. NAME OF INJURED PERSON (First, middle initial, last): Charles E.Jones (2) D.C. No 17.
4. ADDRESS OF INJURED PERSON (Number and street, city and state): 2546-1st. Avenue, South, St. Petersburg, Florida
5. DATE OF ACCIDENT OR FIRST DISABILITY (Month, day, year): July 19, 1960
6. DATE DISABILITY BEGAN (Month, day, year): July 20, 1960
7. NAME OF INJURED, OR DEPENDENTS OF INJURED TO WHOM COMPENSATION WILL BE PAID: Charles E.Jones
8. AVERAGE WEEKLY WAGE $ 81.00 MULTIPLIED BY % = COMPENSATION RATE $ 27.00 50%

(Maximum compensation limit—$70.00 per week)

9. COMPENSATION WILL BE PAID FROM (Month, day, year): April 21, 1965.
10. DATE OF FIRST PAYMENT (Month, day, year): May 4, 1965.
11. NAME OF EMPLOYER: Intercounty Construction Company
12. ADDRESS OF EMPLOYER (Number and street, city and state): P.O. Box 329, Hyattsville, Maryland
13. NAME OF INSURANCE CARRIER: HARTFORD ACCIDENT AND INDEMNITY COMPANY
14. AUTHORIZED SIGNATURE: Richard H. Smith
15. TITLE OF PERSON WHOSE SIGNATURE APPEARS IN ITEM 14: Claims Supervisor
16. DATE SIGNED: April 27, 1965.

U.S. DEPARTMENT OF LABOR
Bureau of Employees Compensation
DISTRICT OF COLUMBIA WORKMEN'S COMPENSATION ACT
VANGUARD BUILDING
1111 TWENTIETH STREET NW.
Washington, D.C. 20211

June 1, 1965

REFER TO FILE NO.
15144-49
26

Charles E. Jones
2546 - 1st Ave. S.
St. Petersburg, Florida

Re: Charles E. Jones
Vs: Intercounty Construction Co.
Date of Inquiry: 7/19/60

Dear Mr. Jones:

The Hartford Accident and Indemnity Co. filed form BEC-208 (the green form referred to in your letter of May 21, 1965) as notification that your payments of $54 a week for temporary total disability were being discontinued as of April 21, 1965. The insurance carrier has taken this position because it feels that you are no longer totally disabled as a result of your injury. A representative of the insurance carrier informed me by telephone on May 4, 1965 that the carrier has substantial information upon which to rely to defend its position. It is the carrier's contention that you now have a 50 percent temporary partial disability resulting from the injury, which entitles you to compensation payments of $27 per week.

On January 21, 1965 we sent you a copy of form BEC-307, "Notice to the Deputy Commissioner that Claim Will be Controverted", which was filed by the insurance carrier.

Please note that item (d) (3) states unauthorized medical care in St. Petersburg, Florida. The carrier has denied liabiling for the expense of the medical care you are receiving in Florida because it did not authorize such treatment. Also, it appears that the physician who is treating you has never filed a medical report with the carrier.

You may cash the checks which you received since your payments were reduced, without prejudicing your claim in any way. This will not bar you from pursuing a claim for further compensation.

If you intend to contest the carrier's position, it is suggested that you do so through your attorney so that any claim you are making may be clearly presented. You should also reply to our letter of May 20, 1965 in which we asked you to clarify who your authorized representative is.

Very truly yours,

/s/ D. FREDERICK
D. Frederick
Claims Examiner

cc: carrier
Attorney Lyman
Attorney Miller

- - - - - - - - - - - - - - -

COMPENSATION PAYMENT STOPPED OR SUSPENDED

1. B. C. CASE NUMBER
2. CARRIER'S NUMBER

D.C. exhibit #2

3. NAME AND ADDRESS OF EMPLOYEE

Charles E. Jones
2517 - 3rd. Avenue,N.
St.Petersburg, Florida 33713

NOTE
Retain only copies 2 and 3.

Send copies 1, 4, 5, and 6 to the Deputy Commissioner who will forward employee's copies to him.

4. NAME OF EMPLOYER: Intercounty Construction Company
5. ADDRESS OF EMPLOYER: P.O. Box 339, Hyattsville, Maryland
6. DATE OF INJURY: 7/19/60
7. DATE EMPLOYEE FIRST LOST WORK BECAUSE OF INJURY: July 20, 1960
8. DATE PHYSICIAN FOUND EMPLOYEE ABLE TO RETURN TO WORK
9. DATE EMPLOYEE RETURNED TO WORK
10. AVERAGE WEEKLY WAGES $1.00 (Maximum or minimum rate $70.00 per week) MULTIPLIED BY 2/3 or COMPENSATION RATE $27.00 (50%)
11. GIVE REASONS WHY PAYMENTS HAVE BEEN STOPPED OR SUSPENDED: Carrier has paid $17,280.00 maximum payable under the D.C.Act For Temp. Total and Temp Part.
12. DATE OF THIS NOTICE: January 23, 1963
13. DATE LAST PAYMENT: January 23, 1963

LIST ALL DISABILITY PAYMENTS

TYPE OF DISABILITY	FROM (Mo., day, yr.)	TO (Month, day, year)	AMOUNT PAID PER WEEK	NUMBER OF WEEKS PAID	TOTAL
TEMPORARY TOTAL	7/20/60	1/22/63	$27.00	2[illegible]	$32[illegible]
TEMPORARY PARTIAL	1/23/63	1/23/63	$27.00	1.4[illegible]	$3[illegible]
TEMPORARY PARTIAL*					
PERMANENT PARTIAL (Specify loss)					
PERMANENT TOTAL					
PERMANENT PARTIAL (Schedule loss, facial disfigurement)	PERCENT	PART OF BODY			
				TOTAL →	$[illegible]

*REPORT ON THIS LINE PAYMENTS FOR A PERIOD OF MORE THAN 6 MONTHS IN ADDITION TO PAYMENTS MADE

LIST ALL PAYMENTS MADE ON ACCOUNT OF DEATH

a. NAMES OF DEPENDENTS	b. AMOUNT	c. OTHER EXPENSES	d. AMOUNT
		FUNERAL EXPENSE	
		MEDICAL EXPENSES PAID TO PERSONS OTHER THAN U.S.	
		TOTAL	

14. NAME OF INSURANCE CARRIER OR SELF-INSURED EMPLOYER
HARTFORD ACCIDENT AND INDEMNITY COMPANY

15. SIGNATURE OF PERSON MAKING REPORT
16. TITLE OF PERSON MAKING REPORT
Compensation Division

DEPUTY COMMISSIONER

BEST COPY AVAILABLE

Law Offices of
JEFFERSON deR. CAPPS
3446 FIFTH AVENUE NORTH
ST. PETERSBURG, FLORIDA 33713

TELEPHONE 813/894/4231

Mr. C.M. Moore
Claims Examiner
U.S. Bureau Employees Compensation
P.O. Box 35049
Jacksonville, FL 32202

Dear Mr. Moore:

Re: CHARLES E. JONES
Date of Injury: 19 July 1960
Intercounty Construction Corp.
File NR. DCCA - 15144-49
Carrier's File Nr. 26 (Hartford Ins. Group)

Jefferson de R. Capps, Esq., as counsel for the claimant, CHARLES E. JONES, and KURT P. HAMPP, Esq., counsel for the carrier, HARTFORD INSURANCE GROUP, do hereby stipulate the following as to the above referenced claim:

1. The claimant, CHARLES E. JONES, claims 100% permanent total disability and inability to perform any gainful activity since 19 July 1960.

2. The deposition of ALFRED D. KOENIG, M.D., psychiatrist and neurologist, of St. Petersburg, Florida, may be taken by the claimant and the same is jointly stipulated into evidence for the formal hearing in this cause in lieu of the live testimony of this physician.

3. Currently, the claimant, CHARLES E. JONES, is receiving Veterans Administration and Social Security benefits for 100% disability which benefits are the claimant's only source of income.

4. The claimant, CHARLES E. JONES, duly filed his claim for permanent disability in the above cause with the Bureau on 18 August 1960.

5. The claimant, CHARLES E. JONES, received a copy of form entitled, "Important Notice to Employee", dated 27 April 1965 by carrier, setting forth that claimant had been paid temporary total compensation from 20 July 1960 to 28 April 1965 at $54.00 per week for a total amount paid of $13,392.00, and that claimant was ready for permanent rating.

6. The claimant, CHARLES E. JONES, received a copy of form entitled, "Payment of Compensation Without Award", signed on 27 April 1965 by carrier, setting forth that claimant's weekly wage rate of $81.00 per week would for disability compensation purposes be $27.00 per week (50% of 2/3 of $81.00), said compensation to be paid from 21 April 1965 and commence on 4 May 1965.

7. The employer, through the carrier, filed an Important Notice to Employee, dated 23 January 1968, that as "Carrier has paid $17,280.00 maximum payable under the D.C. Act or (sic: "for") Temp. Total and Temp. Partial", last payment being made on 23 January 1968, payments were stopped or suspended by carrier. Further, that claimant received a copy of said notice.

8. All reports by all doctors as to examination or treatment of claimant shall be stipulated into evidence for the formal hearing in this cause, but carrier or claimant reserve the right to object to the conclusions that may be set forth therein.

9. Claimant acknowledges that the carrier objects to the affidavit of FREDERICK T. SHUE, dated 5 May 1970 filed with the Bureau by letter from claimant's attorney dated 9 July 1970.

10. Letter from Bureau of Disability Insurance, Social Security Administration, dated 2 November 1967, setting forth claimant's record of earnings credited to his social security account for years 1955 through 1960, the same being filed with the Bureau by letter from claimant's attorney, dated 3 April 1970, shall be stipulated into evidence for the formal hearing in this cause.

11. Claimant's attorney, Jefferson de R. Capps, first informed the Bureau that he represented claimant by his letter dated 2 December 1969.

12. Claimant's attorney, Jefferson de R. Capps, first requested hearing upon claimant's claim for compensation for permanent disability by letter to the Bureau dated 11 February 1970.

13. Claimant's attorney agreed to provide carrier's attorney of claimant's rehabilitation efforts since injury on 19 July 1960.

Dated: 15th September 1970

JEFFERSON de R. CAPPS /s/	/s/ KURT PRESTON HAMPP
Jefferson de R. Capps	Kurt Preston Hampp
Attorney for Claimant,	Attorney for Carrier,
CHARLES E. JONES	HARTFORD INSURANCE GROUP

UNITED STATES DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION
DISTRICT OF COLUMBIA COMPENSATION DISTRICT

In the matter of the claim for compensation under the District of Columbia Workmen's Compensation Act	COMPENSATION ORDER REJECTION OF CLAIM FOR ADDITIONAL COMPENSATION AWARD OF MEDICAL EXPENSES
CHARLES E. JONES, Claimant	CASE NO. 15144-49
vs.	
INTERCOUNTY CONSTRUCTION CORPORATION, Employer	
HARTFORD ACCIDENT AND INDEMNITY COMPANY, Insurance Carrier	

Such investigation in respect to the above-entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following:

FINDINGS OF FACT

1. That on July 19, 1960, the claimant above named was in the employ of the employer above named, whose address is 4744 Baltimore Avenue, Hyattsville, Maryland; that the employer was subject to the provisions of an Act of Congress approved May 17, 1928, entitled, "An Act to

provide compensation for disability or death resulting from injury to employees in certain employments in the District of Columbia and for other purposes"; that the liability of the employer for compensation under the said Act was insured by Hartford Accident and Indemnity Company;

2. That on the said day the claimant, while performing services for the employer as a pile driver at a jobsite in the District of Columbia, fell a distance of about 20 feet to the ground and landed on his head and was rendered unconscious; that as a consequence of which he suffered an injury diagnosed as fracture of the right zygoma, right infra orbital ridge, nose and left ulna;

3. That the claimant had previously suffered several non-work related injuries with no findings of permanent disability and after a short period of disability he was able to resume and perform the duties of his regular employment until the injury of July 19, 1960; that subsequent to the injury of July 19, 1960, the substantial medical evidence establishes that the claimant suffered a severe organic personality alteration, secondary to brain damage which superimposed upon his preexisting socipathic personality caused a greater disability to the extent that rehabilitation for gainful employment in the open labor market was not possible; that such disability is permanent in nature, and as a consequence he requires continuous medical treatment and frequent hospitalization; that the injury arose out of and in the course of the employment;

4. That the employer and insurance carrier furnished to the claimant partial medical and hospital care in accordance with Section 7(a) of the Act; that the claimant obtained such additional medical and hospital care as required by the injury; that on October 7, 1963 and June 22, 1965, the

employer and insurance carrier received medical information relating said treatment to the injury of July 19, 1960;

5. That written notice of the injury was not given to the employer within thirty days, but the employer had knowledge of the injury and was not prejudiced by the lack of such written notice;

6. That the claimant filed a claim for payment of compensation on August 12, 1960;

7. That the average weekly wages of the claimant at the time of injury were $81.00;

8. That the employer and insurance carrier voluntarily paid compensation to the claimant from July 20, 1960 to April 20, 1965, 248 weeks, inclusive, at the rate of $54 per week for temporary total disability, amounting to $13, 392; and from April 21, 1965 to January 23, 1968, inclusive, 144 weeks at the rate of $27 per week, based upon 50 percent permanent partial disability, amounting to $3, 888, or a total of $17,280, the statutory limit for temporary total disability and permanent partial disability;

9. That on June 8, 1966, the claimant was declared incompetent by County Judge Ray E. Ulmer of Pinellas County, the State of Florida, and his wife was appointed his guardian;

10. That on February 11, 1970, the claimant's attorney filed claim for payment of additional compensation based upon permanent total disability; that on December 21, 1970, at a hearing first held to consider claimant's claim, the employer and insurance carrier contended that said claim was barred since the claim was not filed within one (1) year after the date of the last payment of compensation, made

on January 23, 1968, in accordance with Section 13(a) of the District of Columbia Workmen's Compensation Act.

Upon the foregoing findings of fact, it is ordered by the Deputy Commissioner that the employer and insurance carrier shall pay reasonable cost of all medical and hospital care required by the claimant as a result of the injury of July 19, 1970.

Upon the foregoing findings of fact, it is further ordered by the Deputy Commissioner that the claim for additional payment of compensation for permanent total disability be and the same hereby is REJECTED for the following reason:

That the claim for payment of additional compensation was not filed within a year of January 23, 1968, the date on which the last installment of compensation was paid to the claimant in accordance with Section 13(a) of the District of Columbia Workmen's Compensation Act.

Given under my hand and filed at Washington, D.C. this twenty-fourth day of May, 1971

/s/ NOAH C.A. WALTER
Noah C.A. Walter
Deputy Commissioner
District of Columbia Compensation District

- - - - - - - - - - - - - - -

PROOF OF SERVICE

I hereby certify that a copy of the foregoing compensation order was sent by certified mail to the claimant's guardian, the employer, the insurance carrier (local office and state office), attorney for the claimant, and the attorneys for the respondents at the last known address of each as follows:

NAME	ADDRESS
Mrs. Mary A. Jones	2517 Third Avenue North St. Petersburg, Florida 33713
Intercounty Construction Corporation	Post Office Box 329 Hyattsville, Maryland 21281
Hartford Accident and Indemnity Company	Post Office Box 12691 St. Petersburg, Florida 33733
Hartford Accident and Indemnity Company	1101 - 17th Street, N.W. Washington, D.C. 20036
Jefferson de R. Capps, Esq. Esquire	3446 Fifth Avenue North St. Petersburg, Florida 33713
Kurt Preston Hampp, Esquire Roney, Ulmer, Woodworth & Jacobs, Attorneys at Law	445 - 31st Street North St. Petersburg, Florida 33733

/s/ NOAH C.A. WALTER
Noah C.A. Walter
Deputy Commissioner

Mailed: May 24, 1971

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF WORKMEN'S COMPENSATION PROGRAMS
DISTRICT OF COLUMBIA COMPENSATION DISTRICT

In the matter of the claim for compensation under the District of Columbia Workmen's Compensation Act

CHARLES E. JONES
Claimant

vs.

INTERCOUNTY CONSTRUCTION CORPORATION
Employer

HARTFORD ACCIDENT AND INDEMNITY COMPANY
Insurance Carrier

COMPENSATION ORDER AWARD OF COMPENSATION
CASE NO. 15144-49

On May 24, 1971, a compensation order was filed in the above-entitled case, rejecting claim for payment of compensation for permanent total disability as not having been filed within the statutory period under the provisions of the District of Columbia Workmen's Compensation Act. The said compensation order is made a part hereof by reference.

The claimant thereafter instituted proceedings for judicial review before the United States District Court for the District of Columbia, Civil Action No. 1172-71. On December 2, 1971, the District Court remanded the case to the Deputy Commissioner for further consideration by him, as may be appropriate.

Acting pursuant to the order of the District Court the Deputy Commissioner has made a further review of the whole record in the case, including the transcripts of testimony of the hearing held December 21, 1970, and he now concludes as follows with respect to the merits of the case and makes the following additional findings of fact which are supplemental to the findings of fact in the compensation order filed by the Deputy Commissioner on May 24, 1971.

FINDINGS OF FACT

That the finding of fact that said claim was not filed within one year after the last payment of compensation made on January 23, 1968, in accordance with Section 13(a) of the District of Columbia Workmen's Compensation Act, and the rejection of claim resulting therefrom, were in error and should be set aside; that said claim filed on August 12, 1960, was in accordance with Section 13(a) of the Act; that from and after the filing of said claim on August 12, 1960, no action to adjudicate said claim was taken; that once a claim has been filed the Act does not provide for payments or settlements finally discharging the liability of the employer on such a claim and the status of the claim once filed remains open and unaffected until a compensation order is filed and issued, as provided under Section 19 of the Act; that on August 26, 1966, the claimant had an informal conference and made application for adjudication for said claim for payment of compensation for permanent total disability; that the claimant's attorney's application for further payment of compensation for permanent total disability made on February 11, 1970, is proper in accordance with Section 13(a) of the Act; that the substantial and creditable evidence sustains that the claimant

continues to suffer a disability as a result of the injury of July 19, 1960; that such disability is permanent in character; that the claimant is entitled to compensation for permanent total disability beginning July 20, 1960 and continuing; that accrued compensation from July 20, 1960 to February 8, 1972, inclusive, 60 weeks at the rate of $54 per week, amounts to $32,562; that the claimant has been paid compensation for temporary total disability and temporary partial disability from July 20, 1960 to January 23, 1968, inclusive, amounting to $17,280; that accrued compensation due and payable to the claimant amounts to $15,282.

Upon the foregoing findings of fact, the Deputy Commissioner makes the following additional

AWARD

That the finding of fact in the compensation order filed on May 24, 1971, that claim was not timely filed, and the rejection of claim resulting therefrom, are hereby set aside, and said claim is hereby declared to have been timely filed in accordance with Section 13(a) of the Act; that the employer, Intercounty Construction Corporation, and the insurance carrier, Hartford Accident and Indemnity Company, shall pay compensation to the claimant as follows: For permanent total disability from July 20, 1960 to February 8, 1972, inclusive, 603 weeks at the rate of $54 per week in the amount of $32,562. The employer and the insurance carrier, having previously paid $17,280 to the claimant as compensation, shall pay forthwith the accrued balance of $15,282, together with interest calculated in accordance with Section 14(b) and (m) of the Act on each past due installment of compensation at the rate of 6 percent per

annum from each original due date until paid, and thereafter shall continue payments of compensation to the claimant for permanent total disability during the continuance of such disability at the rate of $54 per week, payable in biweekly installments, subject to the limitation of the Act or until further order of the Deputy Commissioner.

The employer and the insurance carrier shall also pay the reasonable cost of all medical treatment and hospital care as required by the injury and secured by the claimant since the injury of July 19, 1960, and shall continue to provide and pay the reasonable cost of such medical treatment and care as the nature of the injury and the process of recovery therefrom may require.

A fee for legal services rendered the claimant in connection with this claim is approved in favor of Jefferson de R. Capps, Attorney at Law, 3446 Fifth Avenue North, St. Petersburg, Florida 33713, in the amount of $3,500, such sum to be a lien upon and to be paid out of this award.

Given under my hand and filed at Washington, D.C. this eighth day of February, 1972

/s/ NOAH C.A. WALTER
Noah C.A. Walter
Deputy Commissioner
District of Columbia Compensation District

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INTERCOUNTY CONSTRUCTION CORPORATION, *et al.*, *Plaintiffs,*	:	
v.	:	**Civil Action No. 297-72**
NOAH C.A. WALTER, Deputy Commissioner, *Defendant.*	:	

ORDER

Upon consideration of Plaintiffs' motion for summary judgment, Defendant's opposition thereto, and upon consideration of the entire record herein, it appearing to the Court that Section 22 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §922, is a bar to the jurisdiction of the Deputy Commissioner to enter the challenged compensation order herein, Strachan Shipping Co. v. Hollis, 460 F.2d 1108 (5th Cir. 1972), it is this 15th day of February, 1973.

ORDERED, that Plaintiffs' motion for summary judgment be and is hereby granted, and it is

FURTHER ORDERED, that Defendant be and is hereby permanently restrained and enjoined from carrying into effect any part of the February 8, 1972 order and award of benefits to claimant Charles E. Jones.

/s/ AUBREY E. ROBINSON, JR.
Judge

Dated: February 15, 1973

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 73-1569

INTERCOUNTY CONSTRUCTION CORPORATION
HARTFORD ACCIDENT & INDEMNITY COMPANY

v.

NOAH C. A. WALTER, DEPUTY COMMISSIONER,
U.S. DEPARTMENT OF LABOR, BUREAU OF
EMPLOYEES COMPENSATION, APPELLANTS

MARY JONES, INTERVENOR

Appeal from the United States District Court
for the District of Columbia

Judgment entered
this date

Decided July 3, 1974

Leavenworth Colby, Attorney, U.S. Department of Labor with whom *George M. Lilly*, Attorney, United States Department of Labor was on the brief, for appellant. *Harold H. Titus, Jr.*, United States Attorney

at the time the record was filed and *Ellen Lee Park*, Assistant United States Attorney also entered appearances for appellant.

John C. Duncan, III, for appellees.

Maurice C. Goodpasture was on the brief for intervenor.

Before: LEVENTHAL and ROBB, *Circuit Judges* and SOLOMON,* *United States Senior District Judge* for the District of Oregon

Opinion for the Court filed by *District Judge* SOLOMON.

SOLOMON, *District Judge*: The issue presented in this appeal is whether an injured workman who filed a timely compensation claim and whose employer paid compensation without awaiting an award is barred by Section 22 of the Longshoremen's and Harborworkers' Act (Act), 33 U.S.C. § 922, from seeking additional compensation because he did not file a second claim within one year after his employer stopped paying compensation.

Charles E. Jones (claimant) was injured on July 19, 1960, while working for Intercounty Construction Corporation (employer) in the District of Columbia. On August 12, 1960, he filed a claim for permanent disability under the District of Columbia Compensation Act, 45 Stat. 600, 36 D.C. Code 36-501, with the deputy commissioner of the Bureau of Employee Compensation of the Department of Labor.[1] The claim was filed within

* Sitting by designation pursuant to 28 U.S.C. § 294(d).

[1] The District of Columbia Compensation Act incorporates by reference the Longshoremen's and Harborworkers' Act, 33 U.S.C. §§ 901 *et seq.*, as amended. The deputy commissioners of the Bureau of Employee Compensation of the Department of Labor administer both acts.

the period permitted by Section 13 of the Act.[2] The employer's insurance carrier, Hartford Accident & Indemnity Company (carrier), filed an answer on August 25, 1960, admitting that claimant was injured in the course of his employment but denying that he was permanently disabled to the extent stated in his claim. The carrier[3] also filed a notice that it had started to pay compensation without awaiting an award by the deputy commissioner, a procedure required by Section 14(a)[4] of the Act when liability is not controverted. The claimant was paid $54.00 per week, the amount payable for total disability.

On January 6, 1965, the carrier filed a notice that it was controverting Jones' claim on the grounds of wages, extent of disability, and unauthorized medical care. On April 27, 1965, the carrier informed the deputy commissioner that it was reducing claimant's compensation to $27.00 per week, the rate for 50 per cent temporary

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[2] Section 13(a) provides:

TIME FOR FILING OF CLAIMS

Sec. 13. (a) The right to compensation for disability under this chapter shall be barred unless a claim therefor is filed within one year after the injury, . . . except that if payment of compensation has been made without an award on account of such injury or death a claim may be filed within one year after the date of the last payment.

[3] The term "carrier" shall include "employer" because in this case the interests of the carrier and the employer are identical.

[4] Section 14(a) provides:

(a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer.

partial disability.[5] On June 1, 1965, the deputy commissioner notified the claimant that if he wanted to contest the reduction in payments he should see an attorney. On August 26, 1966, a claims examiner held a hearing at which claimant was present. The conference was adjourned without any recommendation on claimant's renewed claim for total disability benefits.

On January 23, 1968, the carrier stopped paying compensation because it had paid claimant $17,280.00, its maximum liability for any condition other than total permanent disability. On February 11, 1970, claimant requested a hearing on his claim for total permanent disability. Hearings were held on December 21, 1970, and January 14, 1971. On May 24, 1971, Deputy Commissioner Walter entered an order rejecting the claim because the request for a hearing was made more than one year after the carrier's final payment. He held that the claim was barred by Section 22 of the Act, 33 U.S.C. § 922.

Claimant filed an action in the district court to challenge the decision. Shortly thereafter, the Bureau of Employee Compensation concluded that the deputy commissioner's decision was incorrect and agreed to a consent decree remanding the case to the deputy commissioner for further proceedings.[6] On February 8, 1972, the deputy commissioner entered an order awarding claimant compensation for permanent total disability.

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[5] The change from total permanent to temporary partial disability limited the carrier's liability. Under the Act the maximum payable for partial disability was $17,280.00. 33 U.S.C. § 914(m) (1960). There is no maximum liability for total permanent disability.

[6] Neither the employer nor the carrier were parties to the district court action and neither consented to the remand.

Both the employer and the carrier brought this action under 33 U.S.C. § 921(b) to enjoin the deputy commissioner from enforcing the order. The district court granted summary judgment against the deputy commissioner. It held that the claim was barred by Section 22 of the Act. The court relied on *Strachan Shipping Co.* v. *Hollis*, 460 F.2d 1108 (5th Cir. 1972) *cert. denied*, 409 U.S. 887 (1972).

The carrier did not request a hearing before the deputy commissioner during the lengthy administrative proceedings, nor did it ask the deputy commissioner to enter a final compensation order. No compensation order was entered prior to Deputy Commissioner Walter's order of May 24, 1971, which was superseded by his order of February 8, 1972.

Deputy Commissioner Walter appealed. Mary Jones, guardian of the incompetent claimant, intervened.

The basic time limitations on the filing of claims are embodied in Section 13 of the Act. which requires filing within a year after injury or after the last payment of compensation, if compensation has been paid without an award. A further time limitation on action by the Deputy Commissioner is contained in Section 22, which provides:

Modification of Awards

> Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order . . . . Such new order shall not affect any compensation previously paid . . . .

The parties, like the Fifth Circuit in *Strachan Shipping*, have focused the issue almost exclusively on Section 22. We will consider the interpretation of Section 22, taking into account its purpose and legislative history. Nevertheless, we think it is important to stress the bearing of Section 13 on that interpretation, and to note that the claim of the injured employee was filed within one year of his injury as prescribed by Section 13. The issue for the court is not merely the meaning of Section 22 taken by itself, but the proper relationship of Sections 13 and 22 as elements of a sensible and coherent pattern of the statute as a whole.

The carrier contends that the order of February 8, 1972, was barred by the "plain language" of Section 22 because claimant did not request additional compensation until more than one year after the carrier stopped making compensation payments. The deputy commissioner contends that the time limitation in Section 22 applies only to the modification of a final order and does not affect his authority to issue an original order for a claim filed within the time permitted by Section 13.

The deputy commissioner's interpretation of Section 22 as applying only to a modification of a compensation order and not as an additional time limitation on the original filing of a claim is supported by the section's statutory title, "Modification of Awards",[7] and by its reference to an order issued under the section as a "new compensation order". These clauses indicate that the section applies to cases in which a compensation order has already been entered. Similarly, the inclusion of "a mis-

[7] An "award" is a payment made under a compensation order. 33 U.S.C. § 919(e) (1972).

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take in a determination of fact by the deputy commissioner" as a ground for modification of an award implies that a prior compensation order has been entered, since findings of fact are required only in compensation orders. *See* 20 C.F.R. §§ 31.12, 31.13 (1972).

Nevertheless, there is language in Section 22 which is directed to a situation in which no prior final order has been entered. The section provides that the deputy commissioner may review a case "at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued . . . ." This passage could mean that Section 22 applies even if no compensation order has been entered, or that it applies regardless of whether an order has been entered as of "the date of the last payment of compensation". The reference to "a change in conditions" as a ground for modification of an award is also ambiguous. It could refer to conditions found by the deputy commissioner to exist in a prior compensation order, or it could mean conditions which existed when payments were made without awaiting an order.

Since the language of Section 22 is ambiguous, we must look to other sources to determine whether Congress intended the time limitation in section 22 to apply to cases in which no final order was made.

Section 22, as enacted in 1927, permitted the deputy commisioner to review an order "at any time during the term of an award and after the compensation order in respect of such award has become final . . . ." Act of Mar. 4, 1927, c. 509, § 22, 44 Stat. 1437. Because of administrative delays and the Act's emphasis on voluntary compliance, carriers often not only paid compensation but also completed making payments before an order was entered. The deputy commissioner was unable to change the amount due the claimant because the "term

of the award" had expired with the last payment by the carrier. United States Employees' Compensation Commission, Seventeenth Annual Report, at 18 (1933); *Mille v. McManigal*, 69 F.2d 644 (2d Cir. 1934); *F. Jarka Co., Inc. v. Monahan*, 29 F.2d 741 (D.Mass. 1928).

In its Seventeenth Annual Report, the United States Employees' Compensation Commission complained that "Section 22 of the Longshoremen's Act provides [the deputy commissioner] with less authority to do justice to the parties than is contained in any provision for a similar purpose in any State compensation law." *supra* at 18. The Commission recommended that Section 22 be amended to read as follows:

> Sec. 22 Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions, the deputy commissioner may at any time review a compensation order . . . [and] issue a new compensation order . . . , but such new order shall not affect any compensation paid or due under authority of the prior order. The power and jurisdiction of the deputy commissioner over each case shall be continuing, with authority, and after a hearing if applied for, to make such modification or change by a new compensation order whenever he may determine the interests of justice require a modification of an order formerly issued. *supra* at 18.

The Commission's reference to a "new order", "the prior order", and "modification of an order formerly issued" indicates that the Commission did not recommend that Section 22 be amended to apply to cases in which no final order had been entered.

In 1934, Congress amended Section 22 "to broaden the grounds on which a deputy commissioner can modify an award and also while strictly limiting the period, extend the time within which such modification may be made." H.R. Rep. No. 1244, 73d Cong., 2d Sess., April 16, 1934, at 4. The amendment was "in line with the

recommendation of the Commission except that it limits to 1 year after the date of the last payment of compensation the time during which such modification may be made." *Id.* The amendment deleted the original time limitation and substituted "at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued." The phrase "whether or not a compensation order has been issued" was intended to make clear that the deputy commissioner has the authority to modify awards, within the prescribed period, even in cases in which the original compensation order was issued after all payments have been made to the claimant. The amendment did not change the purpose of the section, which, according to the House Report, was to allow deputy commissioners to "modify an award".

In 1938, Section 22 was amended to permit the deputy commissioner to make an award in a case in which he had originally rejected the claim. Act of June 25, 1938, c. 685, § 10, 52 Stat. 1167. The House Report said that "[t]he purpose of this amendment is to extend to such cases the same provisions which now apply in connection with other cases *finally acted upon by the deputy commissioner.*" (emphasis supplied) H.R. Rep. 1945, 75th Cong., 3d Sess., March 14, 1938, at 9.

In our view, the legislative history shows that Congress intended Section 22 to apply only to cases in which the deputy commissioner had "finally acted" by issuing or denying a compensation order. The amendment was not intended to impose an additional time barrier to recovery by claimants who filed within the time permitted by Section 13, and were still awaiting an order on the filed application.

The Fifth Circuit came to the opposite conclusion. A divided panel of that court held in *Strachan Shipping Co. v. Hollis, supra*, that Section 22 barred timely filed

claims which were not refiled within one year after the last payment of compensation, even when no compensation order had been entered. The court did not discuss the legislative history and relied on the "plain language of Section 22". The *Strachan* majority said that:

> It would not be equitable, in our opinion, for courts to approve the deputy commissioner's vigorous efforts to secure voluntary compliance with the Act on the part of employers and their insurers while simultaneously approving the deputy commissioner's refusal to terminate compensation cases, by means of formal orders as envisioned in Section 22 of the Act, when voluntary payments are made.
>
> . . . .
>
> It may well be that our decision . . . will make it difficult for injured employees to obtain adequate compensation commensurate with the full extent of their physical disabilities. Should that eventuality occur, it would be for Congress either to lengthen Section 22's limitations period or to provide other means to postpone the running of the statute of limitations. 460 F.2d at 1116

We reject the reasoning of the Fifth Circuit. A carrier at any time can compel the deputy commissioner to hold a hearing on a pending claim and determine its liability within twenty days after the hearing. *See* 33 U.S.C. § 919(c); 5 U.S.C. § 706(1); *cf. Atlantic & Gulf Stevedores, Inc. v. Donovan*, 274 F.2d 794 (5th Cir. 1960). There is no inequity in continuing pending claims when the carrier can compel a prompt determination.

Here the carrier did not ask for either a formal hearing or the entry of a compensation order, even though such an order would have started the one-year period in which modifications are permitted by Section 22.

The *Strachan* majority did not follow a long-standing and rational interpretation of the Act by the agency charged with the administration of the Act. The regulation issued under Section 22, promulgated on May 31,

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1938, interprets Section 22 as affecting only those cases in which a final order was entered; it does not refer to cases in which an order was not issued.[8] We are unwilling to join the Fifth Circiut in setting aside an agency interpretation that has stood for more than 35 years. *See* Ainsworth, J., concurring and dissenting in *Strachan, supra* at 1117; *see also Udall v. Tallman*, 380 U.S. 1, 16 (1965).

A timely filed claim remains pending until a compensation order is entered by the deputy commissioner. *See Lumber Mutual Casualty Ins. Co. of N.Y. v. Locke*, 60 F.2d 35 (2d Cir. 1932); *American Mutual Liability Ins. Co. of Boston v. Lowe*, 85 F.2d 625 (3d Cir. 1936).[9] Appellant argues that a claim is analogous to a complaint filed under the Federal Rules of Civil Procedure, which remains pending until disposed of by an order of court. We think the analogy has merit. It would be anomalous to require an injured workman to refile a claim in order to preserve his right to compensation when a plaintiff in a civil action does not have to refile his complaint in order to preserve his action. We also believe that such a requirement would contradict the statutory command that the deputy commissioner shall not be bound by "technical or formal rules of procedure" in proceedings under the Act. 33 U.S.C. § 923(a).

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[8] The regulation refers only to "application[s] . . . for modification of an award". 20 C.F.R. § 31.16(a) (1972).

[9] Appellees cite *Lowe* for the proposition that the one-year limitation in Section 22 applies regardless of whether a compensation order has been issued. The *Lowe* court said in dicta that a claim would be barred by Section 22, as amended in 1934, "if we assume that the memorandum . . . was a final order within the terms of the statute". The court did not say that the claim would be barred if no final order had been entered.

The Fifth Circuit's holding bars timely filed unadjudicated claims unless claimants file new claims within one year after their carriers stop paying compensation. Carriers may find it to their advantage to stop payments frequently in the hope that claimants not familiar with the agency's regulations would neglect to file another claim.[10]

The Longshoremen's and Harborworkers' Act "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *see B & P Steamboat Co. v. Norton*, 248 U.S. 408 (1932). It would be harsh and incongrous to force a claimant to refile an unadjudicated claim each time his carrier terminated payments to avoid having his right to compensation permanently barred.

We hold that Section 22 applies only to cases in which a final compensation order has been entered or denied. A claimant, in order to preserve his claim, is not required by Section 22 to refile his timely filed but unadjudicated claim after a carrier stops paying compensation.

All parties agree that appellees are liable for claimant's medical expenses.

The judgment of the district court is reversed. The case is remanded for further proceedings consistent with this opinion.

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[10] *See* letter from John E. Stocker, Assistant Director of the Office of Longshoremen's and Harborworkers' Compensation, to Leavenworth Colby, August 6, 1971, appended to the opinion of Ainsworth, J., concurring in part and dissenting in part in *Strachan, supra* at 1117.

In *Strachan* the carrier stopped paying compensation four times and stopped paying medical benefits twice during a fourteen-year period. Although the repeated termination of benefits in *Strachan* may not be typical, it does show that claimants may be forced to refile claims repeatedly if each termination starts the limitations period to run.

United States Court Of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1569

September Term, 19 73

Civil 297-72

Intercounty Contruction Corporation
Hartford Accident & Indemnity Company

v.

Noah C. A. Walter, Deputy Commissioner,
U.S. Department of Labor, Bureau of
Employees Compensation, Appellants

Mary Jones, Intervenor

United States Court of Appeals
for the District of Columbia Circuit

FILED JUL 3 1973

HUGH E. KLINE
CLERK

Appeal from the United States District Court for the District of Columbia.

Before: Leventhal and Robb, Circuit Judges and Solomon,* United States Senior District Judge for the District of Oregon

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment---------- of the District Court appealed from in this cause is hereby reversed and this case is hereby remanded to the District Court in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court

Hugh E. Kline
Clerk

Date: July 2, 1974
Opinion for the Court filed by Senior District Judge Solomon
*Sitting by designation pursuant to 28 U.S.C. § 294(d)

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Supreme Court, U. S.
F I L E D
OCT 29 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-362

INTERCOUNTY CONSTRUCTION CORP., and
HARTFORD ACCIDENT & INDEMNITY COMPANY,
Petitioners,

v.

NOAH C.A. WALTER, Deputy Commissioner,
U.S. Department of Labor,
Bureau of Employees Compensation,
and
MARY JONES,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Counsel for Respondent, MARY JONES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-362

INTERCOUNTY CONSTRUCTION CORP., and
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NOAH C.A. WALTER, Deputy Commissioner,
U.S. Department of Labor,
Bureau of Employees Compensation,
and
MARY JONES,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Respondent, Mary Jones, as guardian of the incompetent claimant, Charles E. Jones, files this brief in opposition to the petition of Intercounty Construction Corp. and Hartford Accident & Indemnity Company praying for a Writ of Certiorari to be issued for the review of the judgment

and opinion of the United States Court of Appeals for the District of Columbia Circuit entered herein on 3 July 1974.

QUESTIONS PRESENTED

The question is felt to be more accurately stated as:

Where an injured claimant has duly filed a claim under §913 of the Longshoremen's and Harbor Workers' Compensation Act, as applicable to the District of Columbia, and the carrier[1] in its answer denied claimant was permanently disabled, and the claimant only received compensation for temporary disability paid under §914(a), (b) and (e) of the Act without any hearing and order on the claim by the deputy commissioner, does §922 of the Act extinguish the claimant's unadjudicated claim for compensation for permanent disability unless the claimant files another claim within one year after receiving the last payment for temporary disability compensation?

STATUTES INVOLVED

Applicable additional sections of the United States Code, Title 33:

§914. Payment of compensation

(a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer.

(b) The first installment of compensation shall become due on the fourteenth day after the employer has knowledge

[1] "Carrier" refers throughout to the Petitioners, Intercounty Construction Corp., the employer, and to Hartford Accident & Indemnity Company, the carrier.

of the injury or death, on which date all compensation then due shall be paid. Thereafter compensation shall be paid in installments, semimonthly, except where the deputy commissioner determines that payment in installments should be made monthly or at some other period.

* * * * *

(e) If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subdivision (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subdivision (d) of this section, or unless such nonpayment is excused by the deputy commissioner after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

* * * * *

(m) The total money allowance payable to an employee as compensation for an injury under this chapter shall in no event exceed in the aggregate the sum of $17,280: *Provided*, That this limitation shall not apply to cases of permanent total disability or death: *And provided further*, That in applying this limitation there shall not be taken into account any amount payable under section 908(g) of this title for maintenance during rehabilitation or any amount of additional compensation required to be paid under this section for delay or default in the payment of compensation or any amount accruing as interest upon defaulted compensation collectible under section 918 of this title.

4 Mar. 1927, c.509, §14, 44 Stat.1432
26 Jul. 1956, c.735, §5, 70 Stat.665.

STATEMENT OF THE CASE

This Respondent adopts the Petitioners' Statement of the Case, except to add that, in Petitioners' reference to the deputy commissioner's 24 May 1971 compensation order which rejected claimant's claim for compensation as being time-barred (Petition pgs. 7-8), the deputy commissioner did find that the claimant was permanently and totally disabled in the course of his employment (App. 2).

REASONS FOR NOT GRANTING THE WRIT

There is no need for the Court to exercise its discretion to issue its Writ of Certiorari to review the case below. The facts in the claimant, *Jones*, case below are different from that in *Strachan Shipping Co. v. Hollis* 460 F.2d 1108 (5th Cir. 1972) *cert. denied* 409 U.S. 887, *reh. denied* 409 U.S. 1002 (1972).

In *Strachan* the claimant and the carrier, in the fifth of many prehearing conferences, agreed before the claims examiner that claimant had suffered a 12% permanent partial loss of use of the left leg, the claims examiner in his memorandum of the conference recommended that the carrier make voluntary payment of the compensation due for this permanent partial disability which the carrier so paid. The Fifth Circuit adopted the position of the district court below that this was a "last payment" within §922 of the Act thereby triggering the one-year bar under this section. *Strachan*, pages 1111, 1114 and 1116. In this case below, there was no "last payment" to the claimant, Jones, as in *Strachan*. The claimant, Jones, had merely received the total of $17,280.00 as temporary disability compensation as authorized by §914(m) of the Act, and there was no agreement and payment (or payment without agreement) of permanent disability compensation as in *Strachan*. (Petitioners' App. 4a)

Under the theory of the *Strachan* case there must be a "last payment" whereby the one-year time-bar of §922 is triggered. As there was no such "last payment" in the *Jones'* case, the time-bar of §922 cannot be applied.

Conceding *en arguendo* that *Strachan* was wrongly decided on the basis set forth by the appellate court below in *Jones*, there is no need for this rejection of the *Strachan* case to create a conflict with the Fifth Circuit. The appellate court in *Jones* below merely did not distinguish the facts in reaching what is a correct result. It may be that the deputy commissioner in *Strachan* should have joined in the petition to this Court for review of the Fifth Circuit's decision on the grounds that an important question of Federal law not heretofore decided by this Court should be so decided, and because the decision in that case had so far departed from the accepted course of judicial proceedings so as to call for the exercise of this Court's power of supervision. U.S. S.Ct. Rule 19(b). This, however, is not before this Court.

In like manner the precedent cited by Petitioners (Petition, pgs. 11-12) as providing a similar interpretation as in *Strachan* are all unreported cases or do not constitute precedent. Whether or not appeal or review should have been sought in those cases is not in issue here.

All of the above being so, it is respectfully suggested that Petitioners' reasons for granting the Writ, numbers II, III, IV, V and VI (Petition, pgs. 10-20), cannot become applicable.

The application of §922 under the facts in *Strachan*, where an agreed "last payment" of compensation for permanent disability has been paid, not having been ruled upon in another circuit, it would appear that there is no necessity for the Court to exercise its discretion to issue the Writ, for naught else appearing " * * * time may further illumine or completely outmode the issues in dispute". *Rice v. Sioux City*

Memorial Park Cemetery 349 U.S. 70, 77, 99 L.Ed. 897, 903, 75 S.Ct. 614 (1954). Until a conflict between the circuits does occur on the same facts as in *Strachan*, a dismissal of the petition would of itself serve as an endorsement to the appellate court's judgment below as to the claimant, Jones.

CONCLUSION

For the reasons set forth above it is respectfully suggested that the petition for Writ of Certiorari should not be granted.

SERVICE

Copies hereof have been provided to counsel of record: John C. Duncan III, Esq., for Petitioners; to the Solicitor General, and Leavenworth Colley, Esq., Special Assistant to the Solicitor General of the Department of Justice, and to William J. Kilberg, Esq., Solicitor, James G. Johnstone, Esq., Acting Associate Solicitor, and George M. Lilly, Esq., of the Department of Labor, for Respondents, pursuant to U.S. S.Ct. Rule 33.

Dated: 25 October 1974

/s/ JEFFERSON de R. CAPPS

JEFFERSON de R. CAPPS
3446 Fifth Avenue North
St. Petersburg, FL 33713
Attorney for Respondent, Mary Jones

APPENDIX

UNITED STATES DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION
DISTRICT OF COLUMBIA COMPENSATION DISTRICT

In the matter of the claim for compensation under the District of Columbia Workmen's Compensation Act	COMPENSATION ORDER
CHARLES E. JONES, *Claimant,*	REJECTION OF CLAIM
vs.	FOR
INTERCOUNTY CONSTRUCTION CORPORATION, *Employer,*	ADDITIONAL COMPENSATION
HARTFORD ACCIDENT AND INDEMNITY COMPANY, *Insurance Carrier,*	AWARD OF MEDICAL EXPENSES
	CASE NO. 15144-49

Such investigation in respect to the above-entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following

FINDINGS OF FACT

1. That on July 19, 1960, the claimant above named was in the employ of the employer above named, whose address is 4744 Baltimore Avenue, Hyattsville, Maryland; that the employer was subject to the provisions of an Act of Congress approved May 17, 1928, entitled, "An Act to provide compensation for disability or death resulting from injury to employees in certain employments in the District of Columbia and for other purposes"; that the liability of the employer for

compensation under the said Act was insured by Hartford Accident and Indemnity Company;

2. That on the said day the claimant, while performing services for the employer as a pile driver at a job site in the District of Columbia, fell a distance of about 20 feet to the ground and landed on his head and was rendered unconscious; that as a consequence of which he suffered an injury diagnosed as fracture of the right zygoma, right infra orbital ridge, nose and left ulna;

3. That the claimant had previously suffered several non-work related injuries with no findings of permanent disability and after a short period of disability he was able to resume and perform the duties of his regular employment until the injury of July 19, 1960; that subsequent to the injury of July 19, 1960, the substantial medical evidence establishes that the claimant suffered a severe organic personality alteration, secondary to brain damage which superimposed upon his preexisting socipathic (*sic*) personality caused a greater disability to the extent that rehabilitation for gainful employment in the open labor market was not possible; that such disability is permanent in nature, and as a consequence he requires continuous medical treatment and frequent hospitalization; that the injury arose out of and in the course of the employment;

4. That the employer and insurance carrier furnished to the claimant partial medical and hospital care in accordance with Section 7(a) of the Act; that the claimant obtained such additional medical and hospital care as required by the injury; that on October 7, 1963 and June 22, 1965, the employer and insurance carrier received medical information relating to said treatment to the injury of July 19, 1960;

5. That written notice of the injury was not given to the employer within thirty days, but the employer had

knowledge of the injury and was not prejudiced by the lack of such written notice;

6. That the claimant filed a claim for payment of compensation on August 12, 1960;

7. That the average weekly wages of the claimant at the time of injury were $81.00;

8. That the employer and insurance carrier voluntarily paid compensation to the claimant from July 20, 1960 to April 20, 1965, 248 weeks, inclusive, at the rate of $54 per week for temporary total disability, amounting to $13,392; and from April 21, 1965 to January 23, 1968, inclusive, 144 weeks at the rate of $27 per week, based upon 50 per cent permanent partial disability (*sic*: see footnote below), amounting to $3,888, or a total of $17,280, the statutory limit for temporary total disability and permanent partial disability;

9. That on June 8, 1966, the claimant was declared incompetent by County Judge Ray E. Ulmer of Pinellas County, the State of Florida, and his wife was appointed his guardian;

10. That on February 11, 1970, the claimant's attorney filed claim for payment of additional compensation based upon permanent total disability; that on December 21, 1970, at a hearing first held to consider claimant's claim, the employer and insurance carrier contended that said claim was barred since the claim was not filed within one (1) year after the date of the last payment of compensation, made on

---

The deputy commissioner incorrectly referred to this payment as being "permanent partial disability" whereas the payment of $3,888 was for temporary partial disability, see copy of Bureau of Employees' Compensation Form BEC -208A, Notice Compensation Payment Stopped or Suspended, dated January 23, 1968 at Petitioners' App. 14a.

January 23, 1968, in accordance with Section 13(a) of the District of Columbia Workmen's Compensation Act.

Upon the foregoing findings of fact, it is ordered by the Deputy Commissioner that the employer and insurance carrier shall pay reasonable cost of all medical and hospital care required by the claimant as a result of the injury of July 19, 1970 (*sic*: 1960).

Upon the foregoing findings of fact, it is further ordered by the Deputy Commissioner that the claim for additional payment of compensation for permanent total disability be and the same hereby is REJECTED for the following reason:

That the claim for payment of additional compensation was not filed within a year of January 23, 1968, the date on which the last installment of compensation was paid to the claimant in accordance with Section 13(a) of the District of Columbia Workmen's Compensation Act.

Given under my hand and filed at Washington, D.C. this twenty-fourth day of May, 1971

/s/ NOAH C. A. WALTER

NOAH C. A. WALTER
Deputy Commissioner
District of Columbia
Compensation District

PROOF OF SERVICE

I hereby certify that a copy of the foregoing compensation order was sent by certified mail to the claimant's guardian, the employer, the insurance carrier (local office and state office), attorney for the claimant, and the attorneys for the respondents at the last known address of each as follows:

NAME	ADDRESS
Mrs. Mary A. Jones	2517 Third Avenue North St. Petersburg, Florida 33713
Intercounty Construction Corp.	Post Office Box 329 Hyattsville, Maryland 21281
Hartford Accident and Indemnity Company	Post Office Box 12691 St. Petersburg, Florida 33733
Hartford Accident and Indemnity Company	1101 - 17th Street, N.W. Washington, D. C. 20036
Jefferson de R. Capps, Esquire	3446 Fifth Avenue North St. Petersburg, Florida 33713
Kurt Preston Hampp, Esquire Roney, Ulmer, Woodworth & Jacobs, Attorneys at Law	445 - 31st Street North St. Petersburg, Florida 33733

/s/ NOAH C.A. WALTER

Deputy Commissioner

Mailed: May 24, 1971

Supreme Court, U. S.
FILED
DEC 18 1974

No. 74-362

In the Supreme Court of the United States

OCTOBER TERM, 1974

INTERCOUNTY CONSTRUCTION CORPORATION, ET AL., PETITIONERS

v.

NOAH C. A. WALTER, DEPUTY COMMISSIONER OF THE BUREAU OF EMPLOYEE COMPENSATION OF THE UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

WILLIAM J. KILBERG,
Solicitor,

MARSHALL H. HARRIS,
Associate Solicitor,

JOSHUA T. GILLELAN, II,
Attorney,
Department of Labor,
Washington, D.C. 20210.

In the Supreme Court of the United States

OCTOBER TERM, 1974

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INTERCOUNTY CONSTRUCTION CORPORATION, ET AL., PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 500 F. 2d 815. The district court's order (Pet. App. 13) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 3, 1974, and the petition for a writ of certiorari was filed on September 30, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether administrative authority to try an unadjudicated claim for disability compensation under the Longshoremen's and Harbor Workers' Compensation Act lapses due to the employer's termination of payments of compensation made in partial satisfaction of that claim.

STATUTES INVOLVED

The pertinent provisions of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. 901 *et seq.*, are set forth at Pet. 2-5.

STATEMENT

On July 19, 1960, Charles E. Jones was injured in the course of his employment with Intercounty Construction Corporation. On August 12, 1960, he filed a claim against Intercounty and its compensation insurer, Hartford Accident & Indemnity Company, under the District of Columbia Workmen's Compensation Act, 36 D.C. Code 501 *et seq.*, which makes the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, applicable to employment in the District of Columbia. The claim alleged that Jones had sustained a permanent disability, the extent of which could not yet be determined. Hartford filed an answer to the claim on August 25, 1960, admitting that Jones had sustained a compensable disability but denying "that claimant was permanently disabled to the extent stated in the claim." At the same time, however, Hartford also filed with the Deputy Commissioner of the Bureau of Employee Compensation of the Department of Labor a notice that it had begun paying Jones compensation at the rate of $54 per week, which was then the maximum weekly payment under the Act. Accordingly, the Deputy Commissioner took no action on Jones's claim.

On January 6, 1965, while continuing to make such payments, Hartford filed a notice of controversion of Jones's 1960 claim, specifying that it denied, among other things, the claimed extent of disability. Then, on April 21, 1965, the insurer reduced Jones's weekly payments to $27, based on an assumed 50 percent disability. The payments continued at this reduced rate until January 23, 1968, at which time the aggregate compensation paid to Jones reached $17,280, the maximum liability under the Act for partial disabilities incurred prior to 1961. Since it denied that Jones was permanently and totally disabled, Hartford declined to pay any further compensation.

Two years later, on February 11, 1970, Jones requested a hearing on his 1960 claim for compensation. The hearing was held on December 21, 1970 and January 14, 1971; Deputy Commissioner Walter issued an order on May 24, 1971, ruling that Section 22 of the Longshoremen's Act, 33 U.S.C. 922, barred any award of additional compensation where, as here, the claimant had not filed a second claim within one year of the last voluntary payment of compensation. However, in the course of review proceedings in the United States District Court for the District of Columbia, the Deputy Commissioner consented to an order of remand, and upon remand he issued a new order, ruling that since Jones's timely 1960 claim had never been adjudicated, he had not been required to file a new claim upon termination of the employer's voluntary payments, and finding that Jones was in fact permanently and totally disabled as a result of the 1960 accident.

This action was then brought in the same district court by Intercounty and Hartford, requesting injunctive relief against the Deputy Commissioner's compensation order on the ground that Section 22 of the Act

permits the issuance of such an order after the termination of voluntary payments only if the claimant files a new claim within one year of that termination. The district court, relying upon *Strachan Shipping Co.* v. *Hollis,* 460 F.2d 1108 (C.A. 5), certiorari denied *sub nom. Lewis* v. *Strachan Shipping Co.,* 409 U.S. 887, agreed with petitioners' construction of the Act and accordingly enjoined the Deputy Commissioner from implementing the challenged order. The Deputy Commissioner appealed, joined by Mary Jones, the claimant's guardian. The court of appeals reversed, and in doing so expressly stated its disagreement with *Strachan Shipping Co.* v. *Hollis, supra.*

DISCUSSION

1. Section 13 of the Longshoremen's Act, 33 U.S.C. 913, requires that claims for disability compensation be filed within one year after the date of injury. It is undisputed that the claimant here filed a timely claim under that provision. Section 19 of the Act empowers the administrative law judge,[1] without restriction as to time, to hear and determine all questions with respect to a timely claim and to issue an order rejecting the claim or making an award. Petitioners contend, however, that an unadjudicated claim lapses when an employer has made, and then terminated, payments of compensation with respect to that claim and the administrative law judge issues no ruling on the claim within one year thereafter. We disagree.

[1]The 1972 amendments to the Longshoremen's Act transferred the adjudicatory functions under the Act from deputy commissioners to hearing officers (now administrative law judges) qualified under the Administrative Procedure Act. See 33 U.S.C. (1970 ed., Supp. II) 919(d).

Petitioners rely upon the fact that the one-year period within which an award may be *modified* under Section 22 of the Act begins to run on the date of the last payment of compensation "whether or not a compensation order has been issued." But the significance of that phrase in Section 22 is merely that where payments of compensation have been made without an award, any subsequent award is subject to administrative reconsideration only within one year of the date of the last payment. No provision of the Act causes unadjudicated claims to lapse or places a time bar upon the initial administrative consideration and adjudication of such claims.

2. The decision below is in acknowledged conflict with the Fifth Circuit's decision in *Strachan Shipping.*[2] We agree with petitioners that the conflict should be resolved by this Court.[3]

As Judge Ainsworth noted in his dissenting opinion in *Strachan Shipping, supra,* 460 F. 2d at 1117, the question raised here may affect the rights of many compensation claimants. Indeed, several claims to additional compensation that turn on the resolution of this question are currently pending before Department of Labor administrative law judges. Unless this Court resolves the conflict created by the decision below, there is likely to be protracted litigation over this question in the lower federal courts.

[2]Respondent Jones asserts that the cases may be distinguished on the ground that in *Strachan Shipping,* but not here, the Deputy Commissioner had *recommended* the making of a payment. That distinction is unpersuasive. In our view the critical point is that each case involved the initial adjudication of a timely claim and not merely reconsideration of a prior adjudication.

[3]In opposing the petition for a writ of certiorari in *Strachan Shipping,* we took the position that the Fifth Circuit's decision was in error but expressed the view that "in the absence of a conflict between the circuits, review by this Court is [not] warranted" (Pet. App. 18).

CONCLUSION

For the foregoing reasons, we do not oppose the granting of the petition for a writ of certiorari.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

WILLIAM J. KILBERG,
Solicitor,

MARSHALL H. HARRIS,
Associate Solicitor,

JOSHUA T. GILLELAN, II,
Attorney,
Department of Labor.

DECEMBER 1974.

DOJ-1974-12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-362

INTERCOUNTY CONSTRUCTION CORP., and
HARTFORD ACCIDENT & INDEMNITY COMPANY,
Petitioners,

v.

NOAH C.A. WALTER, Deputy Commissioner,
U.S. Department of Labor
Bureau of Employees Compensation

and

MARY JONES,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR PETITIONERS

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IN THE

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NOAH C.A. WALTER, Deputy Commissioner,
U.S. Department of Labor
Bureau of Employees Compensation

and

MARY JONES,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF FOR PETITIONERS

OPINION BELOW

The Opinion of the Court of Appeals is reported at 500 F.2d 815. (App. 26-37)

JURISDICTION

The judgment of the Court of Appeals was entered on July 3, 1974 (App. 2). The Petition for a Writ of Certiorari was filed on September 30, 1974, and was

granted on January 20, 1975. The jurisdiction of this Court rests on 28 U.S.C. §1254 (1).

QUESTION PRESENTED

Where more than one year has elapsed between the date of last compensation payment and assertion of a claim for additional workmen's compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act, as made applicable to the District of Columbia, is the employee's claim for additional compensation barred by the one-year time limitation provisions of the Act?

STATUTES INVOLVED

The relevant statutes, as of the dates involved in this case, provided as follows:

United States Code, Title 33:

§ 913. Time for filing of claims

(a) The right to compensation for disability under this chapter shall be barred unless a claim therefor is filed within one year after the injury, and the right to compensation for death shall be barred unless a claim therefor is filed within one year after the death, except that if payment of compensation has been made without an award on account of such injury or death a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or such death occurred.

(b) Notwithstanding the provisions of subdivision (a) of this section failure to file a claim within the period prescribed in such subdivision shall not be a bar to such right unless objection to such failure is made at the first hearing of such claim in which all parties in interest are given reasonable notice and opportunity to be heard.

(c) If a person who is entitled to compensation under this chapter is mentally incompetent or a minor, the provisions of subdivision (a) of this section shall not be applicable so long as such person has no guardian or other authorized representative, but shall be applicable in the case of a person who is mentally incompetent or a minor from the date of appointment of such gaurdian or other representative, or in the case of a minor, if no guardian is appointed before he becomes of age, from the date he becomes of age.

(d) Where recovery is denied to any person, in a suit brought at law or in admiralty to recover damages in respect of injury or death, on the ground that such person was an employee and that the defendant was an employer within the meaning of this chapter and that such employer had secured compensation to such employee under this chapter, the limitation of time prescribed in subdivision (a) of this section shall begin to run only from the date of termination of such suit.

March 4, 1972, c. 509, §13, 44 Stat. 1432.

§914. Payment of Compensation.

* * *

(m) The total money allowance payable to an e employee as compensation for an injury under this chapter shall in no event exceed in the aggregate the sum of $17,280.00: *Provided,* That this limitation shall not apply to cases of permanent total disability or death: *And provided further,* That in applying this limitation there shall not be taken into account any amount payable under Section 908(g) of this title for maintenance during rehabilitation or any amount of additional compensation required to be paid under this section for delay or default in the payment of compensation or any amount accruing as interest upon defaulted compensation collectible under Section 918 of this Title.

Mar. 4, 1927, c. 309, §14, 44 Stat. 1432; May 26, 1934, c. 354, §4, 48 Stat. 807; June 25, 1938, c. 685, §7, 52 Stat. 1167; June 24, 1948, c. 623, §5, 62 Stat. 603; July 26, 1956, c. 735, §5, 70 Stat. 655.

§ 922. Modification of awards

Upon his own initiative, or upon the application of any party in interest on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case in accordance with the procedure prescribed in respect of claims in Section 919 of this title, and in accordance with such section issue a new compensation order

which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the Secretary.

March 4, 1972, c. 509, §22,44 Stat. 1437; May 26, 1934, c. 354, §5, 48 Stat. 807; June 25, 1938, c. 685, §10, 52 Stat. 1167.

District of Columbia Code:

§ 36-501. Longshoremen's and Harbor Workers' Compensation Act made applicable to District of Columbia.

The provisions of Chapter 18 of Title 33, U.S. Code, including all amendments that may hereafter be made thereto, shall apply in respect to the injury or death of an employee or an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term "employer" shall be held to mean every person carrying on any employment in the District of Columbia, and the term "employee" shall be held to mean every employee of any such person. (May 17, 1928, 45 Stat. 600, ch. 612, § 1).

Effective Date

Section 3 of the Act May 17, 1928, provided that: "This Act [adding this section and section 36-502] shall take effect July 1, 1928."

STATEMENT OF THE CASE

On July 19, 1960, Charles E. Jones (hereinafter claimant or employee) was injured while working for Intercounty Construction Corporation (hereinafter employer) (App. 27). On August 12, 1960, he filed a claim under the District of Columbia Workmen's Compensation Act, 45 Stat. 600, 36 D.C. Code §36-501, for workmen's compensation benefits due to permanent disability with the Bureau of Employees' Compensation, U.S. Department of Labor. (App. 27)

On August 25, 1960, the employer's workmen's compensation carrier, Hartford Accident & Indemnity Company, (hereinafter carrier) filed an answer admitting that the claimant was injured in the course of his employment but denying that he was permanently disabled to the extent stated in the claim. (App. 28) At the same time, the carrier filed a written notice to the Deputy Commissioner that payment of compensation had been begun without awaiting an award. (App. 28) The carrier then commenced paying the claimant $54.00 per week, the then maximum weekly rate for temporary total disability. (App. 28)

On January 6, 1965, the carrier filed a written notice with the Deputy Commissioner indicating that Mr. Jones' claim would be controverted due to wages, extent of disability, and unauthorized medical care in St. Petersburg, Florida. (App. 28) The maximum weekly benefits of

$54.00 per week continued to be paid to the claimant by the carrier until April 27, 1965, when it informed the Deputy Commissioner that it was reducing the claimant's compensation to $27.00 per week, which payments were computed on a 50% temporary partial disability basis. (App. 28, 29)

On June 1, 1965, the claimant and his attorney were notified by the Claims Examiner of the U.S. Department of Labor, who was handling Mr. Jones' claim, of the carrier's position relative to the reduction in weekly payments, and he indicated that if the claimant intended to contest the carrier's position, he should do so through his attorney so that any claim he was making might be clearly presented. (App. 29) On August 26, 1966, an informal conference was held by the Claims Examiner with the claimant, his attorney, and the carrier's representative present. The conference was adjourned without any resolution of the claim, and no recommendations were made by the Claims Examiner. (App. 29)

On January 23, 1968, the carrier filed with the Bureau of Employees Compensation, B.E.C. Form 208, indicating that compensation payments had been stopped since the statutory maximum under the District of Columbia Workmen's Compensation Act (except for permanent and total disability) had been paid. 33 U.S.C. §914 (m) (App. 29) Both the claimant and his attorney received a copy of said notice. (App. 12, 14)

On February 11, 1970, attorney Jefferson de R. Capps requested a hearing on Mr. Jones' claim for permanent and total disability. (App. 15, 29 Hearings on that claim were held in Tampa, Florida, on December 21, 1970, and January 14, 1971, before Deputy Commissioner R. H. Bergeron, Deputy Commissioner for the Sixth Compensation

District. (App. 29) On May 24, 1971, Deputy Commissioner Noah C.A. Walter, of the District of Columbia Compensation District, entered a compensation order rejecting the claim of Charles E. Jones on the basis that more than one year had elapsed between the date of last compensation payment and the new claim for permanent total disability advanced by the claimant's attorney. (App. 16-20, 29)

The claimant then filed suit in the U.S. District Court for the District of Columbia to set aside this determination whereupon counsel for the claimant and counsel for the defendant Deputy Commissioner presented a consent order for remand (the employer and carrier not being a party to the action). (App. 29) The case was then sent back to Deputy Commissioner Walter for a determination on the merits, and on February 8, 1972, the Deputy Commissioner entered an order awarding the claimant compensation for permanent total disability. (App. 21-24, 29)

The employer and carrier in turn filed suit in the U.S. District Court for the District of Columbia to enjoin enforcement of the compensation order. Upon consideration of the parties' respective motions for summary judgment, the District Court held that the claim of Charles Jones for permanent and total disability was barred by §22 of the Act, relying on *Strachan Shipping Co. v. Hollis,* 460 F.2d 1108 (5th Cir. 1972), *cert. denied,* 409 U.S. 887 (1972), *rehearing denied,* 409 U.S. 1002 (1972). (App. 25, 30)

The Deputy Commissioner noted a timely appeal, and while the matter was pending before the Court of Appeals, Mary Jones, guardian of the incompetent claimant, was permitted to intervene. (App. 2)

On July 3, 1974, the United States Court of Appeals for the District of Columbia Circuit reversed the District Court and held that the time limitation provisions of the Longshoremen's Act did not bar the claim of Charles Jones for permanent and total disability. In doing so, it expressly rejected the *Strachan Shipping Company v. Hollis* case, 460 F.2d 1108 (5th Cir. 1972), *cert. denied* 409 U.S. 887, (1972), *rehearing denied* 409 U.S. 1002 (1972), upon which the District Court had relied. (App. 26-37)

SUMMARY OF ARGUMENT

Section 22 of the Longshoremen's and Harbor Workers' Act, as made applicable to the District of Columbia, both by its plain language and court decisions interpreting same, provides that a Deputy Commissioner has the power, at any time prior to one year after the date of last payment of workmen's compensation benefits, whether or not a compensation order has been issued, to increase, decrease, terminate, continue, reinstate or to award compensation. If a claimant, therefore, fails to apply for further compensation within a year after he has received his last compensation benefits, then his claim is time-barred, and the Deputy Commissioner has no further power to act thereon.

The statutory scheme of the Longshoremen's Act, and the administrative handling thereof, both are designed to insure that injured workers promptly receive the workmen's compensation benefits to which they are entitled on a voluntary basis without the necessity of going through formal hearings. Employers and insurance carriers who voluntarily pay workmen's compensation benefits to an injured worker without an award or without a formal compensation order, will not enjoy the limitation provisions of §22 with respect to old or stale claims, while those carriers, who

controvert their liability to the extent of having a formal compensation order issued, will enjoy that protection if the Court of Appeals view in this case is sustained.

ARGUMENT

I. PLAIN LANGUAGE OF STATUTE INDICATES EMPLOYEE'S CLAIM IS TIME-BARRED.

The basic question raised on this appeal is whether or not the time limitations provisions of §22 of the Longshoremen's Act bar the claim of Charles Jones for additional compensation where more than one year has elapsed between the cessation of voluntary compensation payments and the assertion of a claim for additional benefits. Petitioners respectfully contend that the claim is time-barred.

Prior to the Court of Appeals decision in this case, the leading and most recent case construing the Act's one-year time limitations provisions was *Strachan Shipping Co. v. Hollis*, 460 F.2d 1108 (5th Cir. 1972), *cert. denied*, 409 U.S. 887, (1972) rehearing denied, 409 U.S. 1002 (1972). There the employee filed his original claim for workmen's compensation benefits within one year from when he was injured. During the ensuing years, numerous informal conferences were held, and intermittent voluntary compensation payments were made by the Workmen's Compensation carrier. No formal hearing was ever held nor any formal compensation order entered.

Approximately 12 years after the date of last compensation payment, the claimant submitted a second written claim, and the Deputy Commissioner awarded him compensation benefits, the carrier's time-limitation defense under §22 being rejected. In both the District Court

(323 F. Supp. 1123 [S.D. Tex. 1970]) and appellate consideration of the time limitations problem, it was held that since the claimant had not filed his second claim for workmen's compensation benefits within one year from the date of last payment of compensation, further compensation for that injury was barred by §22 of the Act.

The Fifth Circuit panel pointed out that the Act reflected a legislative intention to encourage voluntary payment of compensation benefits and to discourage formal hearings. In addition to policy considerations and general Congressional intent to secure voluntary compliance with the Act by employers, the Court also noted that the language of §22 triggering the one-year limitation period from the date of last compensation payment was plain.

There is other precedent similarly interpreting the Act's time limitations provisions. In the case *O'Keeffe v. U.S.F. & G. Co.*, 338 F.2d 21 (5th Cir. 1964), one Walter Williams sustained a back injury while working for the Gibbs Corporation on July 10, 1957. He received workmen's compensation benefits from July 11, 1957 to September 28, 1957. (Pet. for Cert., App. 19-24)

On September 26, 1958, he filed a formal claim with the Deputy Commissioner. On August 26, 1959, the carrier paid compensation from September 28, 1957, to November 28, 1958.

On July 4, 1961, the employee wrote a letter to the Deputy Commissioner, which was treated as a claim for compensation, and eventually on February 21, 1963, the Deputy Commissioner entered an award for additional compensation.

Upon the carrier's complaint to set aside the award, as being barred by the time limitations provisions of §22, the U.S. District Court Judge for the Middle District of Florida, Jacksonville Division, sustained the carrier's contention, and the award was vacated. The case was appealed, and the District Court's decision was affirmed in a cursory *per curiam* opinion.

In the unreported case of *Maryland Casualty Co. v. Britton*, U.S. District Court for the District of Columbia, Civil Action No. 14297 (1942), where an appeal was initially noted by the government, but abandoned, the employee sustained an injury to the finger on his left hand in a linotype machine on August 8, 1936. (Pet. for Cert., App. 25-33) On November 10, 1936, the employee filed a written claim for compensation, and at the same time also executed a written waiver of his right to a formal hearing plus a willingness to accept a 50% permanent partial disability rating on the finger. The insurance carrier agreed to the rating and paid the employee accordingly.

The carrier paid additional compensation on May 27, 1938, and the appropriate form was filed with the Bureau. On June 20, 1941, the employee filed another written claim against the employer, alleging additional disability as a result of the original occurrence in 1936. Justice Jennigns Bailey reversed the Deputy Commissioner and held that §22 of the Act barred the right of the employee from any entitlement to further compensation, since he had failed to file a further claim within one year from the date of last compensation payment by the carrier.

Also to be considered is the unreported case of *Jessie Harris v. CECO Corp.*, Case No. 73-DCWC-5, decided by Administrative Law Judge William Naimark on April 26,

1973 (Pet. for Cert., App. 34-42). No appeal was taken from that decision by either the claimant's attorney or the Director, Office of Workers' Compensation Programs.

The decision reveals that on June 8, 1966, the claimant was struck in the abdomen while working as a carpenter's helper. Within one year from the date of injury, he filed a written claim for workmen's compensation benefits with the Bureau of Employees Compensation, U.S. Department of Labor.

Subsequently, the Claims Examiner recommended payment of compensation on a permanent partial disability basis, which was made by the carrier on October 27, 1967. No further claim for additional compensation benefits was made until more than one year after that date. Judge Naimark held that any claim for additional compensation benefits was barred by the time limitations provisions of the Act.

Despite the foregoing decisions, all of which were cited to the Court of Appeals, it was held by that court that §22 of the Act applied only to cases in which a final compensation order had been entered or denied. (App. 26-37) Petitioners respectfully suggest that that holding was erroneous.

In discussing the rationale for arriving at that conclusion, the Court of Appeals noted at the outset that since the statutory title of §22 was "Modification of Awards," this supported the concept that §22 should apply only to a modification of a compensation order. (App. 31) To begin with, that was the heading for §22 when it was first enacted in 1927 when the statute dealt only with the power of the Deputy Commissioner to act during the term of an award and after a compensation order with respect to that award had become final. That section was amended

in 1934 and a provision substituted giving the Deputy Commissioner power to review a case, "at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued . . . " (App. 34)

In 1938, §22 was further amended to permit the Deputy Commissioner to make modification at any time prior to one year after he had rejected a claim. (App. 34)

33 Section U.S. Code 919(e) makes a distinction between an order rejecting a claim and the making of an award which it characterizes as a compensation order. Despite this differentiation and despite the 1938 amendment which brought rejected claims within the purview of §22, the title to that section still remained the same, i.e., "Modification of Awards." It can thus be seen that the retention of the original title to §22 cannot be considered as persuasive, particularly where later changes in the text of that section extend beyond the original designation.

The Court of Appeals did appear to concede that there was language in §22 which was directed to a situation in which no prior final order had been entered, but felt it was ambiguous. (App. 32) It noted that that section did provide that the Deputy Commissioner might review a case, "at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued . . . " (App. 32) The Court stated:

> "This passage could mean that §22 applies even if no compensation order has been entered, or that it applies regardless of whether
>
> the last payment of compensation' " (App. 32)

It also found the reference to a change in conditions as being ambiguous and therefore felt obliged to review the pertinent legislative history. (App. 32)

Petitioners contend that neither of the suggested interpretations of §22 by the Court of Appeals should make any difference in the result in this case. If §22 applies, even if no compensation order had been entered, then employee Jones' claim would be time-barred as not having been made within one year from the date of last compensation payment. If §22 applies regardless of whether a compensation order has been entered as of the date of the last payment of compensation, the claim would still be time-barred.

Petitioners contend, furthermore, that §22 of the Act is clear and not ambiguous, as the court in the *Strachan Shipping Co. v. Hollis* case held, and hence resort to the legislative history of the 1934 amendment thereto is not necessary. As was noted by Justice Felix Frankfurter, in *62 Cases, More or Less, Each Containing Six Jars of Jam v. United States,* 340 U.S. 593, 596 (1951), statutory construction,

> "is to construe what Congress has written. After all, Congress expresses its purpose by words. It is for us to ascertain, neither to add nor to subtract, neither to delete nor to distort."

Assuming that a review of §22's legislative history is in order, however, it is useful to compare the statute as it originally existed, the recommendations proposed by the United States Employees' Compensation Commission, Congress' reports and the hearings thereon, plus what was in fact finally inserted. The original unamended version of §22 provided:

"Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions, the Deputy Commissioner may, at any time during the term of an award and after the compensation order in respect of such award has become final, review a compensation case in accordance with the procedure prescribed in respect of claims in §919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase or decrease such compensation, or award compensation . . . "

Because the United States Employees Compensation Commission in its 17th Annual Report to Congress felt, as it had since its 12th Annual Report, that §22 of the Longshoremen's Act inhibited the Deputy Commissioner and gave him less authority to do justice to the parties, than similar provisions under State Compensation Acts, it recommended that §22 be amended as follows:

"Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions, the Deputy Commissioner may at any time review the compensation order . . . and issue a new compensation order. . . , but such new order shall not affect any compensation paid or due under authority of the prior order. The power and jurisdiction of the Deputy Commissioner over each case shall be continuing, with authority, and after a hearing if applied for, to make such modification or change by a new compensation order whenever he may determine the interests of justice require a modification of an order formerly issued." (App. 33)

The Commission's recommendations, therefore, attempted to give the Deputy Commissioner continuing power and jurisdiction, with no time limitations at all, to act with respect to compensation orders. Congress, in amending §22, although it sought to broaden the grounds on which the Deputy Commissioner could modify an award, also sought to strictly limit the period during which a modification could be made.

It should be noted that Congress did not merely rubber stamp the Commission's recommendations. First of all, it did not adopt the revisions proposed by the Commission. Secondly, as both the House of Representatives and Senate Reports reflect, the six amendments to the Act, including §22, were the result of numerous and extended conferences between representatives of maritime employers' organizations, representing the carriers, the international longshoremen's associations, representing the employees, and represented a series of compromises between the two. These amendments were submitted to the United States Employees' Compensation Commission, which pronounced them fair and equitable. H.R. Rep. No. 1244, 73rd Cong., 2nd Session, April 16, 1934, at 1, 2; Senate Report No. 588, 73rd Cong., 2nd Session, March 28, 1934, at 1. Counsel's research has failed to reveal, however, any public hearings held by either body prior to passage of the 1934 Amendment and Congressional floor discussion does not appear to elucidate the matter.

It is useful, though, to review the scenario when further amendments to §22 were proposed in 1935 before their eventual enactment in 1938. Suggested revisions were submitted by the Honorable Z. Lewis Dalby, Chief Counsel of the U.S. Employees Compensation Commission on April 30, 1937, to Subcommittee No. 4 of the

House Judiciary Committee, 75th Congress, 1st Session, on H.R. 5690. In Section 10 at Page 10 of the hearing, the report stated,

> "In the amendment of §22 of the Longshoremen's Act, as contained in the Act of May 26, 1934, no provision was made for the application of the enlarged authority therein provided to cases in which the action of the Deputy Commissioner has been a rejection of the claim. In such a case in which there has been no 'payment of compensation', the amendment fails to provide for reopening. Experience indicates that the same reasons for reopening, as provided for in this section, may exist where the claim has been rejected *as in the case where compensation has been paid either with or without an award.* The purpose of this amendment is to extend to such cases the same provisions which now apply in connection with other cases finally acted upon by the Deputy Commissioner." (Emphasis added.)

At Page 20 of the Hearing, while explaining the proposed section 22 amendment, Mr. Dalby stated,

> "Section 10 of the bill relates to §22 of the Act as it was amended in 1934. In that amendment, the possibility to review an award made by a Deputy Commissioner – the possibility of the Deputy Commissioner to review his own award – was enlarged to the extent that he might reopen the case within 1 year after the last payment of compensation. But it was all

> made to depend upon the payment of compensation.
>
> "So that in a case where the claim had been rejected, and there was therefore no payment of compensation, the right to reopen was not given. And that has seemed to be probably an oversight in the drafting of that amendment and it has certainly worked injustice. We are proposing now to make that §22 extend also to that situation by adding in the provision, 'or at any time prior to one year after the rejection of a claim', and also that he may award compensation. I believe that will be clear without further statement."

Mr. Dalby was then questioned by Representative Tolan at Page 22-23 of the Hearing Record, as follows:

MR. TOLAN. May I ask you about section 10?
MR. DALBY. You mean section 10 of the act?
MR. TOLAN. Yes.
MR. HEALEY. Section 10 of the existing act?
MR. DALBY. Yes, sir. I have some copies of the act and shall be glad to give them to you gentlemen, if you wish.
MR. TOLAN. I am referring to that amendment – or at any time prior to 1 year after the rejection of the claim.
MR. DALBY. That is section 13(a).
MR. HEALEY. Where is that – in the bill?
MR. DALBY. In the bill. You are referring to the amendment in section 30. That is on

top of page 10. That is section 11 of the bill and the limitation upon the right to file a claim is section 13(a) of the act which I have just handed you. It reads this way:

> "The right to compensation for disability under this act shall be barred unless a claim therefor is filed within 1 year after the injury –"

and so on.

MR. TOLAN. That is not what I want. The language that I refer to is –

> "upon his own initiative or upon the application of any party in interest, on the ground of a change in conditions or because of a mistake in a determination of fact by the Deputy Commissioner, the Deputy Commissioner may at any time prior to 1 year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to a year after the rejection of a claim***"

MR. DALBY. That is the amendment.

MR. TOLAN. I was just trying to clear up that language, "at any time prior to 1 year." Is not that unlimited?

MR. DALBY. We have simply taken the law as it is at present. That is an amendment which was made in 1934, which you will see in this pamphlet.

MR. HEALEY. What section are you talking about?

MR. DALBY. Section 22 of the act. It is section 10 of this bill.

MR. HEALEY. I have it now.

MR. DALBY. The provision that you want to look at is –

MR. HEALEY. (reading):

> "or at any time prior to 1 year."

MR. DALBY. Yes, sir. I may say about that, that the Commission did not draft this provision 22. The Commission did not submit that amendment but accepted it and we are now trying to perfect it as it was then passed in this particular. The language which you are commenting upon is language now in the law which we are not trying to touch, because although I think it is logically subject to the criticism you make, practically it has not given any difficulty from that point of view.

It can thus be seen that Congress not only imposed a one-year requirement, contrary to the recommendations of the Commission, but it also declined to limit that section to compensation orders only, since it inserted, "whether or not a compensation order has been issued . . ."

The significance of the 1934 amendment is illustrated in the case of *American Mutual Libaility Insurance Co. of Boston v. Lowe,* 85 F.2d 625 (3d Cir. 1936). There, in considering whether the written claim of Longshoreman Zagami, which had never been the subject of a formal compensation order, was barred by §22, the Third Circuit compared §22's original language, when the claimant was hurt in 1930, to the 1934 amendment, which is applicable in this case. The Court remarked, in holding the claim to

be timely, that the 1934 amendment, which limited the Deputy Commissioner's Power to . . .

> "at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued . . . review a compensation case, 'gave no indication of retroactivity and hence should not be so interpreted.' " 85 F.2d 627.

Therefore, impliedly, if not expressly, the Court suggested that a different result would pertain if the amendment which applies here controlled. Had this not been the case, there would have been no need to discuss it. For a similar interpretation, see the district court analysis in *Strachan Shipping Co. v. Hollis,* 323 F. Supp. 1122, 1125 (S.D. Tex. 1970).

The Court of Appeals decision in this case, however, in discussing *Lowe, supra,* disagreed and said,

> "the Court did not say that the claim would be barred if no final order had been entered." (App. 36)

Yet the *Lowe* opinion, after holding that a Memorandum from a Deputy Commissioner was not a final order and that the 1934 amendment was not retroactive, stated, at page 627,

> "It follows that the claims existing at the date of the amendment were not thereby destroyed, and the time limitation therein prescribed began to run on the date of enactment, May 26, 1934. *Sohn v. Waterson, supra.*"

Thus, the decision recognized that even where there was no final order, the time-limitations provisions under §22 applied; however, since the claimant's application for further consideration of his claim was filed on September 27, 1934, it was within a year, and therefore timely.

The Court of Appeals decision here also recited that a timely filed claim remained pending until a compensation order was entered by the Deputy Commissioner, citing *Lumber Mutual Casulaty Insurance Co. of New York v. Locke,* 60 F.2d 35 (2d Cir. 1932). (App. 36) That citation is clearly inapplicable, since it was a decision rendered under the original provisions of §22, which did require the issuance of a formal compensation order. Since the 1934 amendment, the time-provisions of §22 apply whether or not a compensation order has been issued.

The Court of Appeals opinion declared its refusal to set aside the Labor Department's settled interpretation of §22, which has stood for more than 35 years (App. 35, 36) There is nothing contained in the record in this case to justify the conclusion that such an interpretation has existed except for the attachment to the concurring and dissenting opinion of Judge Ainsworth, found in *Strachan Shipping Co. v. Hollis,* 460 F.2d 1108, 1117 (5th Cir., 1972), *cert. denied* 409 U.S. 887, *rehearing denied* 409 U.S. 1002. The attachment upon which Judge Ainsworth relied was a letter from John E. Stocker, Assistant Director of the Office of Longshoremen's and Harbor Workers' Compensation, dated August 6, 1971, affixed to the government's appellate reply brief, which was certainly nothing more than a bootstrapping *ex parte* effort by the government to bolster its position. One notes that the lower court decision being appealed from was rendered on November 6, 1970.

In addition, if the §22 interpretation was so well-settled, how does one explain the 1942 decision in *Maryland Casualty Co. v. Britton,* (Pet. for Cert., App. 25-33), the 1964 *O'Keeffe* case (Pet. for Cert., App. 19-24), the 1973 *Harris* case (Pet. for Cert., App. 34-42), and the initial result reached by Deputy Commissioner Walter in this case? In the *Harris* case, for example, no appeal was taken by the Director of the Office of Workers' Compensation Programs, and yet 33 U.S.C. §921a., and the regulations implementing same found in 20 C.F.R. §701, *et seq.* and §801 *et seq.* authorize the Secretary of Labor, the Director, Office of Workers' Compensation Programs, and the Office of the Solicitor of Labor on their behalf, to appeal decisions which affect the general administration of the Longshoremen's Act. There are numerous cases which have been decided by the Benefits Review Board, the initial reviewing body, prior to the Court of Appeals, where the Director of Workers' Compensation alone has appealed diverse general matters relating to the overall administration of the Act, such as settlement authority of Administrative Law judges, assessment of attorney's fees, etc. If Administrative Law Judge Naimark was disturbing the long-standing traditional interpretation by the Director of the Act's time-limitations provisions, an appeal would have been noted.

With respect to the compensation orders issued by Deputy Commissioner Walter, (the first rejecting the claim as being untimely, and the second awarding permanent and total disability), (App. ~~29-33~~ 16-20, ~~34-37~~ 21-24) the only reason the second order was even required was because Leavenworth Colby, (now deceased) the Justice Department attorney who answered the employee's District Court suit for the Deputy Commissioner, admitted basically every allegation of the complaint and endorsed a consent order remanding the case back to Mr. Walter for a determination on the merits.

The Deputy Commissioner's second compensation order did not reflect Mr. Walter's "long-standing interpretation" but rather Mr. Colby's view – the same view which he had unsuccessfully urged in the appellate proceedings in *Strachan Shipping Co. v. Hollis,* 460 F.2d 1108 (5th Cir. 1972) *cert. denied* 409 U.S. 887, *rehearing denied* 409 U.S. 1002.

The effect of the Court of Appeals opinion in this case is contrary to the announced purposes of the Act. Employers are encouraged to promptly make voluntary payments to injured employees without going through formal hearings, because in many areas, the statute is virtually self-executing. *Atlantic and Gulf Stevedores v. Donovan,* 274 F.2d 794 (5th Cir. 1960).

That the voluntary approach under the Longshoremen's and District of Columbia Acts is both encouraged and utilized with no formal hearing, is graphically demonstrated by the following combined statistics from both Acts, gleaned from annual reports and annual statistical reports of the Department of Labor, which counsel has been able to obtain:

Year	"Final Disposition of Injury Cases: Number of Cases Closed:	"Formal Hearings Completed"
1963	107,261	410
1964	112,956	421
1965	122,439	408
1966	122,239	343
1967	114,587*	331
1968	114,587*	281
1969	114,939	314
1970	109,945	261
TOTAL	918,953	2,769

*Average figures

These figures demonstrate that over 99% of the time claims were adjusted without the necessity of formal hearing, and although in theory formal orders may issue without a formal hearing, the instances where this is done would be negligible. The point is that if the Court of Appeals' decision here is adopted throughout the country, then for the 8-year period referenced above, there are potentially hundreds of thousands of claims where the limitations period has not even begun to run despite their being listed by the Labor Department as being finally disposed of and closed.

The beneficient purposes of the statute are undisputed. As this Court, however, stated in *Pillsbury v. United Engineering Co.*, 342 U.S. 197, 201 (1952).

> ". . . We are aware that this is a humanitarian act, and that it should be construed liberally to effectuate its purposes; but that does not give us the power to rewrite the statutue of limitations at will and make what was intended to be a limitation no limitation at all. Petitioners' construction would have the effect of extending the limitation indefinitely if a claim for disability had not been filed; the provision would then be one of extension rather than limitation. While it might be desirable for the statute to provide as petitioners contend, the power to change the statute is with Congress, not us."

A similar theme was sounded in *Strachan, supra:*

> "It may well be that our decision that the payment of September 3, 1957, was the last payment" within the meaning of Section 22 of the Act (thereby triggering the one year limitations period with respect to modifications of compensation awards) will make it difficult for injured employees to obtain adequate compensation commensurate with the full extent of their physical disabilities. Should that eventuality occur, it would be for Congress either to lengthen Section 22's limitations period or to provide other means to postpone the running of the statute of limitations." 460 F.2d 1108, 1116 (5th Cir. 1972).

It is therefore significant that Congress recently embarked on a comprehensive overhaul of the Longshoremen's Act and yet left Section 22 intact. The various amendments to the Act were enacted on October 27, 1972, and became effective on November 26, 1972. The lower court opinion in *Strachan* was rendered on November 6, 1970, and the Court of Appeals' affirmance was dated May 17, 1972. Since both the Assistant Director of the Office of Longshoremen's and Harbor Workers' Compensation, United States Department of Labor, and Mr. Colby, the Special Assistant to the Attorney General, were aware of that case, having been involved in same, and the Labor Department acted in an advisory capacity and participated in the drafting of this recent legislation, it can be assumed that either Congress was not dissatisfied with the court rulings interpreting Section 22 or in general it just declined to respond to invitations for change by the courts.

Further evidence of Congress's disinclination to tamper with the limitations' provisions of the Act is the fact that on June 6, 1941, Representative Welch introduced H.R. 4986, which would have changed both §13(a) and §22. House of Representatives Bills, 77th Congress, 1941-1942, Vol. 22. Although the bill was referred to the House of

Representatives Committee on the Judiciary, it was never enacted.

Finally, consider the language of the Regulations passed in 1938 to insure the proper administration of the Act. The following regulation remained unchanged until the 1972 amendments referred to above. In 20 C.F.R. §31.5, *Claims for Compensation,* one finds,

> A claim for compensation may be filed with the deputy commissioner for the compensation district in which the injury occurred at any time after the first 7 days of disability following any injury, or at any time after death. The right to compensation for disability shall be barred unless a claim therefor is filed within 1 year after the injury, and the right to compensation for death shall be barred unless a claim therefor is filed within 1 year after the death, except that if payment of compensation has been made without an award on account of such injury or death, a claim may be filed within 1 year after the date of the last payment *and except that where the said act provides for the running of the said year limitation from any other date, the provisions of said act shall apply.* For the purpose of filing such claims the Bureau has provided separate forms for use in injury and death cases which shall be furnished to any person desiring to file such a claim, upon application therefor made to such deputy commissioner. (Sec. 19(a), 44 Stat. 1435; 88 U.S.C. 919(a)" (Emphasis added.)

It is respectfully urged that both the statute and the regulations implementing same clearly bar the claim of Charles Jones.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court below should be reversed.

Respectfully submitted,

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Supreme Court, U. S.
FILED
APR 10 1975
MICHAEL RODAK, JR., CLERK

No. 74-362

In the Supreme Court of the United States

OCTOBER TERM, 1974

INTERCOUNTY CONSTRUCTION CORPORATION and HARTFORD ACCIDENT & INDEMNITY COMPANY, PETITIONERS

v.

NOAH C. A. WALTER, DEPUTY COMMISSIONER OF THE BUREAU OF EMPLOYEES' COMPENSATION OF THE UNITED STATES DEPARTMENT OF LABOR
and
MARY JONES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-362

INTERCOUNTY CONSTRUCTION CORPORATION and HARTFORD ACCIDENT & INDEMNITY COMPANY, PETITIONERS

v.

NOAH C. A. WALTER, DEPUTY COMMISSIONER OF THE BUREAU OF EMPLOYEES' COMPENSATION OF THE UNITED STATES DEPARTMENT OF LABOR
and
MARY JONES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (App. 26–37) is reported at 500 F.2d 815. The district court's order (App. 25) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 3, 1974 (App. 38). The petition for a writ of certiorari was filed on September 30, 1974, and was

granted on January 20, 1975. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an individual who has filed a timely claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act must also file an application for review of his case, after his employer terminates payments of compensation without an award, in order to avoid forfeiture of his right to an adjudication of his original claim.

STATUTES INVOLVED

The Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. 901, *et seq.*, provided in relevant part:[1]

Section 13. Time for Filing of Claims.

(a) The right to compensation for disability under this Act shall be barred unless a claim therefor is filed within one year after the injury, and the right to compensation for death shall be barred unless a claim therefor is filed within one year after the death, except that if payment of compensation has been made without an award on account of such injury or death a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or such death occurred.

[1] An amendment to Section 13, not relevant to this case, was enacted in 1972. Pub. L. 92-576, § 12(b), 86 Stat. 1251, 1259. The amendment adds an introductory phrase "[e]xcept as otherwise provided in this section," and provides that the time for filing a claim does not begin to run until the employee or beneficiary is aware, or should have been aware, of the relationship between the employment and the injury or death.

* * * * *

Section 19. Procedure in Respect of Claims.

(a) Subject to the provisions of section 13 a claim for compensation may be filed with the deputy commissioner * * * at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

* * * * *

Section 22. Modification of Awards.

Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case in accordance with the procedure prescribed in respect of claims in section 19, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to

become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the Secretary.

STATEMENT

On July 19, 1960, Charles E. Jones was injured when, during the course of his employment as a pile driver with the Intercounty Construction Corporation, he fell about 20 feet to the ground, landed on his head, and fractured his skull (App. 17). On August 8, 1960, he filed a claim (App. 3) against Intercounty and its compensation insurer, Hartford Accident & Indemnity Company, under the District of Columbia Workmen's Compensation Act, 36 D.C. Code 501, *et seq.*, which makes the Longshoremen's and Harbor Workers' Compensation Act (the "Act") applicable to employment in the District of Columbia.

The claim alleged that Jones was entitled to compensation because, during the course of his employment, he had sustained a permanent disability, the extent of which could not yet be determined (App. 3). Hartford filed an answer to the claim on August 25, 1960, admitting that Jones had sustained a compensable disability but denying "that claimant was permanently disabled to the extent stated in the claim" (App. 4). At the same time Hartford also filed with the Deputy Commissioner of the Bureau of Em-

ployees' Compensation of the Department of Labor a notice that it had begun paying Jones compensation at the rate of $54 per week, which was then the maximum weekly payment under the Act (App. 6). Accordingly, the Deputy Commissioner took no action on Jones' claim.

More than four years later, on January 6, 1965, while continuing to make payments, Hartford filed a notice that it would controvert Jones' claim, because (among other things) it did not agree with the claimed extent of disability (App. 7). Then, on April 27, 1965, the insurer reduced Jones' weekly payments to $27, claiming that Jones' disability was not total but only 50 per cent (App. 9). Hartford also represented that Jones was by then "ready for permanent rating" (App. 8). Jones protested, and an informal conference was convened in the Deputy Commissioner's office on August 26, 1966. During this conference Jones' representative asserted that Jones was permanently and totally disabled (App. 29). The Deputy Commissioner took no action to adjudicate the claim, however, nor did any party request him to take final action (*ibid.*; cf. App. 22).

Hartford continued to make payments at the reduced rate until January 23, 1968, when the compensation paid to Jones reached $17,280, which was then the maximum liability under the Act for permanent partial disability or temporary total disability incurred prior to 1961 (33 U.S.C. (1958 ed.) 914(m)). Since it continued to deny that Jones was permanently and totally disabled, Hart-

ford declined to pay any further compensation (App. 12).[2]

On February 11, 1970, Jones requested a hearing on his claim for compensation. The requested hearing was held on December 21, 1970, and January 14, 1971. Deputy Commissioner Walter concluded that, as a result of his fall and fractured skull in 1960, Jones had suffered "a severe organic personality alteration, secondary to brain damage" that precluded gainful employment, that "such disability is permanent in nature," and that as a result of the accident Jones "requires continuous medical treatment and frequent hospitalization" (App. 17).[3] In spite of his conclusion that Jones was permanently and completely disabled, however, Deputy Commissioner Walter rejected Jones' claim for benefits because "the claim for payment of additional compensation was not filed within a year of * * * the date on which the last installment of compensation was paid to the claimant * * *" (App. 19).

Jones sought review of this decision in the United States District Court for the District of Columbia, and the government consented to a remand so that the Deputy Commissioner could enter a new order. On

[2] After the 1965 reduction in benefits Jones had been advised by letter of his opportunity to contest Hartford's action (App. 10–11). No notice of opportunity to contest accompanied or followed the 1968 termination of benefits.

[3] Partly as a result of the brain damage caused by the accident, Jones has been declared incompetent by the Florida state courts (App. 18). He is represented in this Court by his wife, who has been appointed as his guardian. Jones also receives Veterans' and Social Security benefits; he is rated totally disabled for both purposes (App. 14).

remand Deputy Commissioner Walter concluded that "the status of [a] claim once filed remains open and unaffected until a compensation order is filed and issued" (App. 22), and, accordingly, that Jones had not been required to file any claim after Hartford had discontinued payments to him. Based on the earlier conclusion that Jones was permanently and completely disabled, Deputy Commissioner Walter ordered Hartford to resume payments to Jones and to make back payments of $15,282 and interest (App. 23–24).

This action was then commenced in the same district court by Intercounty and Hartford, seeking injunctive relief against the compensation order on the ground that Section 22 of the Act bars the Deputy Commissioner from adjudicating a claim unless the claimant renews his claim within a year after the termination of voluntary payments of compensation.[4]

[4] Prior to the 1972 amendments to the Act, hearings on claims for disability benefits were held before a deputy commissioner (Section 19(c), 33 U.S.C. 919(c)) and review could be sought in a district court (Section 21(b), 33 U.S.C. 921(b)). Under the revised procedures all of the hearing powers of deputy commissioners have been assumed by hearing examiners (now administrative law judges) (33 U.S.C. (Supp. II) 919(d)). Decisions of a hearing examiner are "effective" once filed in the office of a deputy commissioner (33 U.S.C. (Supp. II) 921(a)), but may be appealed, at the behest of any party, to a Benefits Review Board appointed by the Secretary of Labor (33 U.S.C. (Supp. II) 921(b)). Decisions of the Benefits Review Board can be reviewed by a petition to the court of appeals for the circuit in which the injury occurred (33 U.S.C. (Supp. II) 921(c)). In the interest of uniformity references in this brief are to pre–1972 procedures. However, all references and arguments are equally applicable to current procedures.

The district court, relying upon *Strachan Shipping Co.* v. *Hollis,* 460 F.2d 1108 (C.A. 5), certiorari denied *sub nom. Lewis* v. *Strachan Shipping Co.,* 409 U.S. 887, agreed with petitioners' construction of the Act, and enjoined the Deputy Commissioner from implementing the challenged order (App. 25).

Deputy Commissioner Walter appealed, and Jones' guardian intervened. The court of appeals reversed (App. 26–37), holding that Section 22 of the Act requires a claim for additional compensation to be made only when

> the deputy commissioner had "finally acted" by issuing or denying a compensation order. The [section] was not intended to impose an additional time barrier to recovery by claimants who filed within the time permitted by Section 13, and were still awaiting an order on the filed application [App. 34].

Because the Deputy Commissioner had not previously acted on Jones' original claim for compensation, which had been timely filed, the court of appeals held that the compensation order should be reinstated.

SUMMARY OF ARGUMENT

The time limitation of Section 22 of the Act applies only to applications to modify administrative decisions on compensation claims. Although the time limitation contained in Section 22 runs from the date of the last payment of compensation, whether or not that payment was made after a prior award, this does not mean that the Section is applicable even if no award has been entered. The applicability of Section 22 is triggered by the issuance of a compensation order and

only then does the limitations period upon rehearings become applicable.

A. Section 22 was part of the original version of the Act, and, as enacted in 1927, it provided that a deputy commissioner may, during the term of an award and after it has become final, review the order and modify it because of a change of circumstances. As petitioners acknowledge, it was expressly limited to modifications of formal compensation orders, and this limitation was understood by the courts. Consequently, *Lumber Mutual Casualty Insurance Co.* v. *Locke,* 60 F. 2d 35 (C.A. 2), held that a deputy commissioner could make an initial award, based on a prior but unadjudicated claim, well after the payment of compensation without an award had terminated.

B. The strict "during the term of an award" limitation on the time for review prompted calls for revision. The United States Employees' Compensation Commission proposed that the time should be lengthened in the interest of justice, in order to provide for the case in which the "term" of an award expired prior to its entry. In 1934 Congress followed this recommendation, and amended Section 22 to provide that a deputy commissioner may "review" a compensation case, and enter "a new compensation order," at any time "prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued * * *." Congress thereby furnished a more adequate period of time—a full year after the last payment of compensation—within which to review a compensation order or award. References to "modification" of awards recur in the committee reports and recommendations of the Commission, and

there is no indication that any member of Congress thought that the revised language altered Section 22 in any way other than by extending the time within which to seek modification.

Section 22 was amended again in 1938, and Congress for the first time made it possible for a deputy commissioner to review an order denying compensation. Again the legislative history is replete with references to the scope of the Section. Committee reports stated that it applied to cases that previously had been finally acted upon by the deputy commissioner.

At about the same time as the 1938 amendment was adopted the Commission for the first time promulgated regulations interpreting Section 22. These rgulations, which are entitled to great deference as contemporaneous administrative interpretations by the agency charged with administering the statute, described proceedings under Section 22 as "application[s] to the deputy commissioner for review of a compensation case for modification of an award." 20 C.F.R. (1938 ed.) 31.15.

There is no support in either the legislative history or the language of Section 22 for petitioners' contention that it applies to unadjudicated claims for compensation. The language referring to the date of the last payment of compensation establishes the time from which the year within which to seek modification of an order begins; it does not establish the class of cases to which the period of limitations applies.

C. It is not necessary, or harmonious with the Act, to extend Section 22 to create a second "statute of limitations" applicable to claims that have not received an initial adjudication. The employer is put on notice of the injury and claim for compensation by the notice required by Section 12(a) and the "claim" required by Section 13(a). An additional notification under Section 22 would not add to the employer's notice of the claim, but would introduce a technical "trap" that could jeopardize legitimate claims. Indeed, the prospect of the extinguishment of a claim would encourage employers repeatedly to cease paying compensation, in the hope that a claimant would neglect to file an application under Section 22, and thereby impair the self-executing program of the Act.

Section 22 is most logically read as not applicable to unadjudicated claims. It allows a "new" compensation order to be entered only because of a change in conditions or a mistaken determination of fact by a deputy commissioner. Yet if no initial administrative decision has been made, there can have been no "mistake in a determination of fact," nor can there have been a "change" in the claimant's condition after the entry of an initial award. If, as petitioners contend, Section 22 applies to unadjudicated cases in which compensation has been paid without an award, a claimant whose condition is stable never could secure a resumption of wrongfully discontinued benefits. Congress cannot have intended this harsh result.

To the extent employers legitimately are concerned that, after payment of compensation without an award has been terminated, claims will grow stale and be reactivated years later to their prejudice, they may seek the entry of a compensation order under Section 19 (c). Alternatively, they could request a claimant to

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accept as full payment the amount paid to date; once such an agreement is approved by the deputy commissioner (33 U.S.C. (Supp. II) 908(i)) the employer is discharged. Other courses of action are available. But petitioners pursued none of them, and have not alleged that they were prejudiced by Jones' delay in asserting his rights after they improperly terminated his compensation. Jones therefore is entitled to an administrative decision on his claim; nothing in either the words or the history of Section 22 suggests that his claim should be extinguished without ever having been adjudicated.

ARGUMENT

A CLAIMANT WHO FILES A CLAIM WITHIN THE TIME PROVIDED IN SECTION 13(a) IS ENTITLED TO AN ADJUDICATION AND NEED NOT FILE AN ADDITIONAL APPLICATION AFTER THE EMPLOYER HAS DISCONTINUED PAYMENTS OF COMPENSATION

The Act provides that an individual injured in the course of certain employment is entitled to compensation at specified rates. The right to this compensation does not depend upon a formal program of claims and defenses. Instead, the Act is self-executing, and an employer is required to fulfill its obligations whether or not formal proceedings are commenced.

Within 10 days after learning that an injury has occurred in the course of its employ, an employer is required to notify the deputy commissioner for the compensation district in which the injury occurred. Section 30(a), 33 U.S.C. 930(a). An employee must

give similar notice within 30 days after being injured (Section 12(a), 33 U.S.C. 912(a)), but the giving of this notice is excused if the employer had actual knowledge of the injury (Section 12(d), 33 U.S.C. 912(d)). Within 14 days after notice of the injury the employer must begin making the payments called for by the Act (Section 14(b), 33 U.S.C. 914(b)). It need not and can not await the resolution of an employee's claim for compensation unless it disputes liabiiity, and then may withhold payments only to the extent of the dispute (Section 14(a), 33 U.S.C. 914(a)). If there is a dispute the employer must give prompt notice (Section 14(d), 33 U.S.C. 914(d)). Because the Act provides for employer liability without fault (Section 4(b), 33 U.S.C. 904(b)), there are relatively few disputes concerning compensation. Those disputes fall into two broad categories: the extent of disability attributable to the accident, and whether the accident took place in the course of covered employment.

The deputy commissioner is required to participate in the process only when a dispute requires resolution. A resolution by the deputy commissioner may be obtained by either party pursuant to Section 19(c), 33 U.S.C. 919(c). *Atlantic & Gulf Stevedores, Inc.* v. *Donovan,* 274 F. 2d 794 (C.A. 5). On some occasions the deputy commissioner has a duty to enter controverted cases on his own initiative in order to "protect the rights of all parties." Section 14(h)(2), 33 U.S.C. 914(h)(2).

Once the deputy commissioner has become involved he may resolve the dispute after a hearing or, if there

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is no hearing, more than 20 days after all parties have been notified. Section 19(c), 33 U.S.C. 919(c); *Maryland Casualty Co.* v. *Cardillo,* 99 F. 2d 432 (C.A.D.C.). This decision often is postponed with the acquiescence of both parties; the dispute may turn on the extent or the duration of the disability, which may be more accurately ascertained at some time in the future.[5] Ordinarily, when the deputy commissioner believes that the controversy is ripe for decision, or always upon demand by any party, he holds a hearing and enters a compensation order, awarding or denying compensation. Subject to judicial review and the provision for modification contained in Section 22, this compensation order terminates the administrative proceedings.

Because the employer's duty to pay compensation does not depend upon a demand by the employee, no formal claim for compensation will be made in most cases. Should the employer controvert the extent of its liability, however, an employee must file a "claim," pursuant to Section 13(a), in order to safeguard the right to payment under the Act and to a resolution by the deputy commissioner of any disputes. This claim for compensation must be filed within one year of the injury or, if the employer pays compensation without an award, within a year of the last payment

[5] For example, in the instant case the accident occurred in 1960, and Hartford, although it controverted the claim, paid full compensation until 1965 when it notified the deputy commissioner that Jones was "ready" for a permanent rating (App. 8).

(Section 13(a)); once it has been filed the deputy commissioner "shall have full power and authority to hear and determine all questions in respect of such claim." Section 19(a), 33 U.S.C. 919(a).

Section 13(a), when read in conjunction with Section 19(a), appears to give the deputy commissioner full authority to make at least one compensation order in a disputed case so long as a Section 13(a) claim was timely filed. Petitioners contend, however, that Section 22—entitled "Modification of Awards"— compels an employee to file an application for "review" in order to preserve the right to an adjudication of his first claim. As it now stands, Section 22 allows the deputy commissioner, within "one year after the date of the last payment of compensation, whether or not a compensation order has been issued," to "issue a new compensation order" that may be required because of a change in conditions or "because of a mistake in a determination of fact by the deputy commissioner * * *." Jones did not, within a year after the last payment made by Hartford, seek a "new compensation order" under this Section. Therefore, petitioners assert, he has lost his right to a decision by the deputy commissioner on his original claim.

We submit that Section 22 applies, as its title indicates, only to the modification of a compensation order already entered by a deputy commissioner. Once an award has been entered an employee has one year after the termination of compensation payments—whether or not those compensation payments were

made pursuant to the award[6]—in which to seek a "new" compensation order on the ground of changed circumstances or mistake of fact. But nothing in Section 22 establishes a second statute of limitations applicable to unadjudicated claims for compensation. Petitioners' argument to the contrary is refuted by the history of Section 22, which, as enacted in 1927, was specifically directed at, and limited to, the modification of awards already entered. When Congress amended Section 22 in 1934, adding the words upon which petitioner relies, and again in 1938, it did so with a clear understanding that the Section covered only the modification of outstanding awards.

A. AS ENACTED IN 1927, SECTION 22 APPLIED ONLY TO THE MODIFICATION OF A COMPENSATION AWARD

Section 22 was part of the original version of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 1437. Section 22 as first enacted provided (emphasis added):

> Upon his own initiative, or upon application of any party in interest, on the ground of a change in conditions, the deputy commissioner may at any time *during the term of an award and after the compensation order in respect of such award has become final, review such order* in accordance with the procedure prescribed in respect of claims in section 19, and in accordance with such section issue a new compensation order which may terminate, continue, increase or decrease such compensation. Such new order shall not affect any compensation paid *under the authority of the prior order.*

[6] Because most payments under the Act are made voluntarily, without the necessity of a formal award even in disputed cases, there is a significant number of cases in which payments terminate prior to the making of an award. The award, once entered, may confirm the past payments without ordering additional compensation. In such cases Section 22 requires that modification of the award be sought within a year of the date of the last payment, rather than within a year of the date of the award. See pp. 21–23, *infra*.

As petitioners concede (Pet. Br. 23), this provision applied only to modifications of an award of compensation. It referred to a "prior order" and established a period during which modification could be sought that was completely dependent upon the term of the prior award.

It was so understood by the first courts to interpret it. In *F. Jarka Co.* v. *Monahan,* 29 F. 2d 741, 742 (D. Mass.), an injury was followed by compensation that terminated on April 18, 1928. Five days later the deputy commissioner made an award confirming the compensation previously paid and ordering no new compensation. When a new deputy commissioner modified the award four months later, the court set the modification aside because it had not occurred "during the term" of the previous award, as required by Section 22. The converse problem was presented in *Lumber Mutual Casualty Insurance Co.* v. *Locke,* 60 F. 2d 35, 37–38 (C.A. 2). An employee made a timely claim, but the deputy commissioner made no award. Pursuant to a "settlement"[7] the employer ceased mak-

[7] With the exception now codified in 33 U.S.C. (Supp. II) 908(i), "settlements" are barred by 33 U.S.C. 915(b) and 916, and are treated as if they were compensation paid without an award.

ing payments during September 1928, and the employee did not request additional compensation. But in January 1930 the deputy commissioner made an award, compelling the employer to pay additional compensation. The court of appeals concluded that this procedure was proper because, even though payments without the necessity of an award had long since ceased, the deputy commissioner's jurisdiction continued until he had made an initial award.[8] When the Second Circuit was presented with a situation similar to that in *F. Jarka Co.,* in which the payments without an award had ceased, an award then had been entered, and the employee later sought a modification, it concluded that Section 22 barred any change. *Mille* v. *McManigal,* 69 F. 2d 644 (C.A. 2).

B. AS AMENDED IN 1934 AND 1938, SECTION 22 REMAINED APPLICABLE ONLY TO MODIFICATIONS OF COMPENSATION ORDERS

1. Proposals to Change Section 22 Were Prompted Solely by its Excessive Restrictions on Modifications of Awards

Under the original version of Section 22 an application to modify an award could be made only "during the term of the award" and after the order making such an award had become final. Cases such as *F.*

[8] Cf. *American Mutual Liability Ins. Co.* v. *Lowe,* 85 F. 2d 625, 628 (C.A. 3), which was decided after the 1934 amendment but pertained to payment under the 1927 statute. A "settlement" was made and payment ceased during 1932. More than two years later the employee sought a decision, and the court allowed the deputy commissioner to proceed because a "settlement" is not an award. The Third Circuit, as had the Second, concluded that Section 22 did not affect the Deputy Commissioner's power to make an initial award.

Jarka Co. and *Mille* indicated that the federal courts would not construe Section 22 to allow claims for modification to be made after the payments made pursuant to the award had ended. But there were many cases similar to *F. Jarka Co.,* in which employer payments terminated and were confirmed by a subsequent award. Under the prevailing interpretation of Section 22 there could never be review or modification of the award entered in such a case, even if the employee's condition dramatically deteriorated, because the term of the award had expired before it became final. Moreover, because Section 22 provided that only "a change in circumstances" was a ground for the issuance of a new compensation order, no relief was available if a compensation order had been based upon a misapprehension of fact.

The United States Employees' Compensation Commission, which was then the agency responsible for administration of the Act,[9] suggested almost immediately after the passage of the Act that Section 22 was inadequate and should be amended:

> There being no general provision for reopening a decision once made by the deputy commissioner, except by review on application to the courts within 30 days, or excepting on the ground of a change in conditions, situations are continually arising in which the action taken by the deputy commissioner in correcting an error in an order may give rise to controversy

[9] This responsibility was later transferred to the Bureau of Employees' Compensation. In 1972 authority was retransferred to the Office of Workmen's Compensation Programs of the Department of Labor. See 20 C.F.R. (1972 ed.) 701.201–701.203.

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> and result in a failure to do justice to either the employer or the employee. It is accordingly recommended that an amendment be adopted which will give deputy commissioners the continuing authority to reopen cases that is usually conferred upon compensation boards. [*Twelfth Annual Report of the United States Employees' Compensation Commission* 39–40 (1928).]

The Commission renewed this recommendation the following year,[10] and restated in 1930 that "[a] review now authorized 'during the term of the award' is not sufficient in the interest of justice and the commission believes that section 22 should be amended * * *."[11] The Commission repeated this recommendation verbatim in 1931 [12] and 1932.[13] In 1933 it added the observation that "[i]n many cases the 'term of the award' has ended when the compensation order is issued."[14] There was no hint, either in the recommendations of the Commission or the observations of other contemporaries, that Section 22 was deficient because it allowed claims with respect to which no award had been made to be adjudicated initially after compensation without an award had ceased.

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[10] *Thirteenth Annual Report of the United States Employees' Compensation Commission* 79–80 (1929).

[11] *Fourteenth Annual Report of the United States Employees' Compensation Commission* 75 (1930).

[12] *Fifteenth Annual Report of the United States Employees' Compensation Commission* 77 (1931).

[13] *Sixteenth Annual Report of the United States Employees' Compensation Commission* 49 (1932).

[14] *Seventeenth Annual Report of the United States Employees' Compensation Commission* 18 (1933).

2. The 1934 Amendment Was Designed to Extend The Time During which an Outstanding Award Could be Modified

By an Act of May 26, 1934, 48 Stat. 806, 807, Congress responded to the recommendations of the Commission and amended Section 22 to provide:

> Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, review a compensation case in accordance with the procedure prescribed in respect of claims in section 19, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation. * * *

This amendment thus provided that the modification may be made "at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued * * *." But there is no support in the legislative history for petitioners' interpretation of this language. The Senate and House committee reports were identical in all pertinent respects. Both houses of Congress quoted extensively from the Commission's Seventeenth Annual Report. Each committee wrote:

> [This bill] amends section 22 of the existing act so as to broaden the grounds on which a deputy commissioner can modify an award and also while strictly limiting the period, extends

> the time within which such modification may be made. * * *
>
> * * * * *
>
> The amendment is in line with the recommendation of the Commission except that it limits to 1 year after the date of the last payment of compensation the time during which such modification may be made. The amendment also permits an increase or decrease in the compensation under a modifying award when changed conditions or a mistake in a determination of fact makes such modification desirable in order to render justice under the act, such modifying award to date from the time of the accident.

S. Rep. No. 588, 73d Cong., 2d Sess. 3–4; H. Rep. No. 1244, 73d Cong., 2d Sess. 4. Both committees indicated that the amendment was intended to apply, as did the original Section 22, only to the modification of awards. The committee reports repeatedly refer to "modification" of previously issued orders. The amended version of Section 22 specifies that a "new compensation order" is the outcome of an application for "review"; there is no indication in the legislative history that Congress intended to change the meaning of "new compensation order" between the 1927 version and the 1934 amendment. In both cases the language is explicable only as an order modifying an earlier award.

The new language seized upon by petitioners—the limitation of time during which a new compensation order could be issued to "one year after the date of the last payment of compensation, whether or not a

compensation order has been issued"—does not introduce new considerations into Section 22. Before the amendments, if compensation paid with or without a compensation order terminated prior to the entry of an award, no review or modification of the award was possible. The amendments, recognizing this situation, but implementing the congressional decision to limit "the period * * * within which such modification could be made," did not entirely preclude such anomolous situations. After the amendment it still could be true that, if compensation payments terminated before a compensation order was entered, no modification would be possible. But because of the enlargement of the time available for review, the termination would have had to precede the compensation order by a full year in order to preclude later modification of the order. Whatever reason there may have been for allowing the termination of compensation prior to the entry of an erroneous award to cut off opportunities for modification of the award,[15] the Section after its amendment remained a limitation only on the modification of prior orders, and it was so understood by Congress.

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[15] The language of the amendments was transmitted to Congress by the Commission and had the support of both employer and employee associations. It was a compromise, "the result of numerous and extended conferences between the maritime employers' organizations * * * and the international longshoremen's associations * * *." H. Rep. No. 1244, *supra*, at p. 1. It was enacted as recommended without any relevant change. No committee hearings were held and there were no recorded debates. Consequently, it is impossible to know what considerations underlay this particular compromise.

3. The Legislative History of the 1938 Amendment Shows that Section 22 was Regarded as Relevant Only to the Power to Modify Compensation Orders

The amendment made to Section 22 in 1938, 52 Stat. 1167, does not affect this case. It added language permitting modification of a compensation order at any time prior to one year after the rejection of a claim, and did not alter the language upon which petitioners rely. Its legislative history previously has been discussed by this Court. See *Banks* v. *Chicago Grain Trimmers Association*, 390 U.S. 459, 463–465.

The amendment eventually enacted in 1938 was proposed by the Commission in 1935, approximately six months after the 1934 amendments had been passed. *Eighteenth Annual Report of the United States Employees' Compensation Commission* 38 (1935). Hearings were held during the next three years on this and other proposals to amend the Act. During all of these hearings and related legislative proceedings the congressional understanding of the meaning of Section 22, as amended in 1934, was remarkably consistent. Witnesses and committee reports repeatedly stated that Section 22 pertained only to cases that previously had been "finally acted upon by the deputy commissioner."[16] No intimation to the contrary is recorded.[17]

[16] See H. Rep. No. 1807, 74th Cong., 1st Sess. 5; S. Rep. No. 1199, 74th Cong., 1st Sess. 4; H. Rep. No. 2237, 74th Cong., 2d Sess. 5; Hearing before Subcommittee No. 4 of the House Committee on the Judiciary, on H.R. 3625 and H.R. 5690, 75th Cong., 1st Sess. 10, 20; H. Rep. No. 1945, 75th Cong., 3d Sess. 8–9; Hearings before a Subcommittee of the Senate Committee on the Judiciary, on H.R. 5690; S. Rep. No. 1988, 75th Cong., 3d Sess. 8–9. See also Hearing before Subcommittee No. 3 of the House Committee on the Judiciary, on H.R. 8293, 74th Cong., 1st Sess. 14.

[17] We do not believe that the statements excerpted at pp. 18–21 of petitioners' brief have a contrary thrust.

At approximately the same time as the 1938 amendment was adopted the Commission for the first time promulgated regulations interpreting Section 22. These regulations reflect the same understanding of the Section, and describe proceedings under Section 22 as "application[s] to the deputy commissioner for review of a compensation case for modification of an award." 20 C.F.R. (1938 ed.) 31.15; 20 C.F.R. (1949 ed.) 31.16.[18] As an essentially contemporaneous administrative in-

[18] 20 C.F.R. (1938 ed.) 31.5 provided, with respect to *claims* filed under the Act, that "where the said act provides for the running of the said year limitation from any other date, the provisions of said Act shall apply." Petitioners apparently argue (Pet. Br. 28) that this indicates that the Commission had acknowledged that Section 22 established a separate statute of limitations. But the "said year" is the year during which the claim required by Section 13(a) must be filed. It is undisputed that a timely claim was filed in this case. The other dates, referred to by the regulation, from which the "said year" would begin to run include the provisions of the Act that toll the limitations period of Section 13(a). See Section 13(c) (time to file claim of minor or incompetent runs from time of appointment of guardian); Section 13(d) (year for filing Section 13(a) claim does not begin until any common law damage action has been decided); Section 30(f) (time to file claim does not begin until employer has filed report of injury under Section 30(a), if that required report was not timely filed). Nothing in 20 C.F.R. (1938 ed.) 31.5 indicates that, once a timely Section 13(a) claim has been filed, a second claim must be made after the occurrence of a tolling event.

terpretation by the agency charged with administering the Act, this understanding of Section 22 is entitled to deference. *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 210; *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433–434; *Udall* v. *Tallman*, 380 U.S. 1, 16; *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408.

Throughout its history, from its adoption in 1927 through its amendments in 1934 and 1938, Section 22 was regarded by Congress and by the Commission as a regulation upon the time during which compensation orders entered by a deputy commissioner could be reviewed.[19] Nothing in that history, or in the words of the 1934 amendment, supports petitioners' argument that Section 22 requires a compensation claimant to file a second claim, after voluntary payments have ceased, in order to preserve the right to an adjudication of an original timely claim.[20] As we now demonstrate, the interpretation of Section 22 we have described above is consistent with and supported by the language and structure of the Act itself.

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[19] Petitioners suggest (Pet. Br. 12–13, 24–25) that the government's decision not to appeal administrative cases interpreting Section 22 as an additional time bar indicates that the government accepted those decisions as correct. However, many other considerations, including the merits of a claimant's case, are considered by the government in the process of deciding whether to appeal a particular case, and it is inaccurate to suggest that failure to appeal signifies acquiescence in the legal statements contained in an opinion.

[20] Cf. *O'Keeffe* v. *Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256: "The plain import of [the 1934] amendment was to vest a deputy commissioner with broad discretion to correct mistakes of fact * * *."

C. THE STRUCTURE, LANGUAGE AND PURPOSES OF THE ACT NEITHER CONTEMPLATE NOR REQUIRE A SECOND CLAIM FOR COMPENSATION

1. Requiring a Further Notice in Addition to a Section 13(a) Claim Would Be Inconsistent with the Act's Design and Purpose

As we have discussed at pages 12–15, *supra*, the Act is predominantly self-enforcing. Once an employer has knowledge that an injury has occurred in the course of covered employment, it is under a statutory duty to begin compensation, whether or not an employee has made a formal claim for compensation. The "claim" required by Section 13(a) does not fulfill the function, usually assigned to a statute of limitations, of giving notice to a potential adversary so that claims do not become stale and evidence lost. Pursuant to Section 12, if the employer does not acquire actual knowledge of the injury within 30 days, recovery is barred; if the employer does not independently acquire knowledge (triggering its duty to pay compensation), it must be furnished by the employee. A Section 12(a) notice can fulfill this requirement. The employer then can take whatever steps are necessary to protect its interests. The claim under Section 13(a) serves as a formal joinder of issues—a notice of demand that the employee will assert his or her right to a formal adjudication before the deputy commissioner when, or if, the compensation paid by the employer without an award is unsatisfactory.

Once the employer has received the notice (under Section 13(a)) that the employee will assert the right to a formal administrative hearing, it would not be advantageous or necessary to the purposes of the Act

to require a second notice (under Section 22) to the same effect. Indeed, the requirement of a second notice in this statutory context would be even less justified than a requirement serving "no purpose other than the creation of an additional procedural technicality." *Love* v. *Pullman Co.*, 404 U.S. 522, 526 (footnote omitted). It would serve to make it advantageous to the employer repeatedly to discontinue the payments contemplated by the Act, in the hope that some claimants would allow a year to go by without making a second claim for compensation. That would insulate the employer from further liability, even liability that, by hypothesis, it should bear. Such an incentive to discontinue the very payents which it is the central purpose of the Act to provide should not be created unless Section 22 will admit of no other construction; the Act should be "construed liberally in furtherance of the purpose for which [it was] enacted and, if possible, so as to avoid incongruous or harsh results." *Baltimore & Phila. Steamboat Co.* v. *Norton*, 284 U.S. 408, 414.

Moreover, the Act provides that settlements are invalid unless there is formal administrative approval. Compare Sections 15(b) and 16, 33 U.S.C. 915(b) and 916, with Section 8(i), 33 U.S.C. (Supp. II) 908(i). Thus, a claimant's right to an adjudication of the claim cannot be destroyed even by an express, informed agreement to accept a sum less than full compensation. But petitioners' construction of Section 22 would result in "waiver" of the right to full payment, after the filing of a claim, merely by the claimant's *inaction*. It is difficult to reconcile that proposed construction allowing extinguishment by inaction of a timely claim with the Act's express principle that the right to compensation cannot be modified even by agreement. See *Henderson* v. *Glens Falls Indemnity Co.*, 134 F. 2d 320 (C.A. 5), certiorari denied, 319 U.S. 756, which held that even a state court's authorization of a settlement is ineffective to preclude a deputy commissioner's later adjudication.

In any event, the language of Section 22 itself supports the reading we have suggested.

2. Section 22, As It Presently Stands, Is More Logically Read As Not Applicable to Unadjudicated Claims

Section 22 allows the deputy commissioner to "review a compensation case * * * and * * * issue a new compensation order" within a stated period of time. The reference to a "new" compensation order—in language retained from the 1927 version, which expressly contrasted the "new" order with a previous "final" order—suggests that a condition of the Section's application is the existence of an "old" or previous compensation order.

The 1934 addition does not alter the limited applicability of the Section; its limitation on the grounds for the issuance of a "new compensation order" precludes its application to unadjudicated cases. Under Section 22 only two grounds—a "change in conditions" or a "mistake in a determination of fact by the deputy commissioner"—may support the issuance of a new compensation order. The latter ground would not be available in an unadjudicated case because, by

definition, no fact previously has been determined by the deputy commissioner.

The former ground also would be unavailable to claimants. Two possible types of "change" can be imagined. One would be a change of condition since the time the deputy commissioner issued a compensation order.[21] We believe that this is the only correct reading of that language—a reading parallel to the Section's alternative ground of a "mistake in a determination of fact by the deputy commissioner" and consonant with the Section's reference to "a new compensation order." Second, there could be a change in conditions since the payments of compensation had been terminated. But, if this were adopted as an alternative or additional reading of Section 22, many claimants could be completely deprived of an administrative adjudication simply because there would be no "change" in their condition after their employer improperly discontinued compensation. Were the claimant's condition stable, no review would be available even if the claimant sought review within a year of a wrongful termination of payments, because there would have been no "change."[22] The employer and its insurer therefore could prevent a claimant from ever receiving an adjudication of his claim. There is no

[21] Cf. *Jarka Corp.* v. *Hughes*, 299 F.2d 534 (C.A. 2).

[22] In particular, even if Jones had protested the same date Hartford had discontinued payments, review of this case would be impossible under petitioners' interpretation of Section 22. Jones does not allege that there has been a change in conditions; he contends, instead, that he has been totally and continuously disabled since the date of his injury.

reason to believe that Congress intended this harsh result, yet it would be the consequence of petitioners' contention that, in all cases in which compensation had been paid without the necessity of an award, the conditions of Section 22 must be satisfied before a timely claim under Section 13(a) can be adjudicated.

We submit that it is more consistent, both with the structure of the Act and with the language of Section 22, to conclude that the critical language of that Section—"one year after the date of the last payment of compensation, whether or not a compensation order has been issued"—simply establishes the date upon which the year begins to run, and does not establish the class of compensation cases to which the time limitation is relevant. The phrase means only that, if a party seeks modification of a prior compensation order, he or she must do so within one year after the last payment of compensation, whether or not the prior compensation order had been issued at the time of the last payment of compensation.

3. No Interest of an Employer or its Insurer is Jeopardized by Allowing the Employee's Claim To Be Adjudicated After Voluntary Payments Have Ceased

It might be asserted that if this Court agrees with our interpretation of Section 22 a large number of claims—unadjudicated because the employer has paid full and adequate compensation without the necessity of an award—will remain open and subject to further contest, even though they will have become stale. Cf. Pet. Br. 9–10, 25–26. This prospect is illusory.

More than 100,000 "injury cases" are reported to

the Department of Labor every year, as reflected in the table at Pet. Br. 25. Approximately 85 percent of these "cases" are injuries reported pursuant to Section 30(a) by employers but involving no compensable disability: the employee either lost no time from work, or lost less than three days' time, the non-compensable "waiting period" established by Section 6(a) of the Act.

Of those cases for which some compensation is due, the vast majority involve short-term total disability when the employee loses several days of work. Ordinarily such an employee automatically is compensated under Section 14(a) until his return to work, and never files a Section 13(a) claim. If no Section 13(a) claim has been filed, the employer's exposure to potential liability terminates when the one-year period has run.

Most of the remaining cases for which compensation is paid involve partial losses of use of some member of the body. All of these claims are "scheduled" under Section 8(c)(19), and compensation is due in a sum certain. These claims usually are resolved in a mutually satisfactory manner, and rarely require either a claim under Section 13(a) or an award by a deputy commissioner. The few disputes that require administrative resolution concern the fraction of loss of use of the member, and so do not produce claims that may linger to the detriment of an employer.

The Department of Labor estimates that in several hundred claims yearly a Section 13(a) claim is filed and the case remains open. In this class of cases, as

we previously have observed, it is to the advantage of both the employee and the employer to postpone administrative adjudication until accurate estimates of the extent and duration of disability can be made. If the claim is adjudicated too soon, and the employee's condition later improves, the employer can seek modification pursuant to Section 22. But until the change in condition is discovered and a new compensation order entered, the original order must be complied with. however clear it may be that it was mistaken or that it is now unwarranted.[23] Payments made under the order ordinarily are not recoverable even if they were greater than would have been proper, because Section 22 specifies that a modification of an award cannot retroactively affect the compensation already paid pursuant to an award. The employee is anxious to avoid the possibility of underpayments that cannot be made up;[24] the employer is anxious to avoid the possibility of overpayments that cannot be recouped, a possibility that is enhanced because doubtful factual questions presented for premature adjudication must be resolved in favor of claimants.[25] Discrepancies be-

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[23] Cf. *Dillard* v. *Virginia Industrial Commission*, 416 U.S. 783, 789.

[24] Section 22 prohibits new compensation orders that retroactively affect compensation already paid, although it permits future compensation to be increased.

[25] See, *e.g.*, *Robinson* v. *Bradshaw*, 206 F.2d 435 (C.A.D.C.), certiorari denied, 346 U.S. 899; *Butler* v. *District Parking Management Co.*, 363 F.2d 682 (C.A.D.C.); *Young & Co.* v. *Shea*, 397 F.2d 185 (C.A. 5) (collecting cases).

tween the actual payment and the proper payment can be more easily reconciled, however, if the entry of a formal compensation order is postponed.

Once an employer has become convinced that a resolution of the open controversy would be in its interest, it has a number of means available to secure an administrative adjudication. Under Section 19(c) of the Act any party to a pending compensation case is entitled to a hearing and a prompt decision upon demand. See *Atlantic & Gulf Stevedores, Inc.* v. *Donovan,* 274 F. 2d 794 (C.A. 5).[26] In the instant case, petitioners could have pressed the deputy commissioner for a decision after the conference in 1966, but they elected not to do so.

Alternatively, employers who believe that they are entitled to cease making payments can request the employee to agree to settle the claim for compensation already paid. This agreement can be submitted for approval pursuant to Section 8(i), 33 U.S.C. (Supp. II) 908(i). If this agreement is approved, it is embodied in a final compensation order.

In many cases, even if neither the claimant nor the employer requests action, the deputy commissioner, pursuant to Section 14(h)(2), is required to enter a controverted case in order to take action that "will properly protect the rights of all parties." If the deputy commissioner adheres to the requirement of

[26] Although we support the holding in *Donovan*, we disagree with the implication at 274 F.2d 797–798 that the pre-1972 Act excluded state compensation remedies. Compare Section 5 of the Act with 42 U.S.C. 1651(c) and 5 U.S.C. 8173; cf. *Industrial Commission* v. *McCartin*, 330 U.S 622.

Section 14(h)(2), an unadjudicated and controverted claim will not grow stale to the prejudice of any party.[27]

Finally, although we do not suggest this as a preferred course of action, an employer or insurer simply may cease its payments, as it did here, and await action by the claimant. If a claimant with a legitimate claim to additional compensation takes no action, the employer or insurer has escaped liability. If, on the other hand, an individual entitled to compensation delays, even for several years, protesting the discontinuation, the employer or insurer has lost nothing. The claimant eventually will receive an award requiring the insurer to make retroactive payments, but these payments will be compelled only if the termination of compensation was improper.

The employer can suffer prejudice because of a claimant's delay only if important evidence has been lost solely as a result of the delay. This will rarely be the case.[28] The employer knows—because a timely

[27] Of course, the deputy commissioner's neglect of his Section 14(h)(2) duties would not by itself terminate the claimant's right to compensation.

[28] Indeed, important evidence is much more apt to be lost in a class of cases in which stale claims can be made regardless of Section 13(a) or Section 22. Suppose, for example, that an employee is injured and is paid compensation without an award, first for a period of temporary total disability and then, after an examination by the insurer's medical staff, for continuing partial disability. Regardless of any interpretation of Section 22, an employee who has filed a timely Section 13(a) claim could assert, any number of years after the reduction of payments, that he had become totally disabled again shortly

claim under Section 13(a) has been filed but not adjudicated—that the propriety of its termination of payments is subject to question; it therefore will not dispose of the medical evidence supporting its actions.

A large fraction of the cases in which benefits are terminated after a lengthy period, but without an award having been made, involve claims of total and permanent disability, which the employer asserts is either permanent and partial or total but temporary. The evidence that would resolve such claims does not dissipate over time. If the employee is in fact permanently and totally disabled, relevant evidence is readily at hand after even a lengthy interruption in benefits. Similarly if, as the employer might claim, the disability is only partial, or has ended, the necessary evidence can be gathered from an examination of the claimant whenever he or she protests the termination of the compensation. Any prejudice that may remain is attributable to the congressional program, and

after the examination upon the basis of which payments had been reduced. If the employee had medical evidence to that effect, and if he should be found to be totally disabled at present, the employer may be unable to meet his allegation that he became so years ago, and will be required to make retroactive payments. Such a situation potentially could arise, and prejudice an insurer, far more often than the situation of the type exemplified by the instant case. Nothing in Section 22, even under petitioners' interpretation, guards against it. We submit that this and similar examples demonstrate that Section 22 is not designed, nor is it well suited, to prevent prejudice because of delay in claims in which there never has been a compensation order.

would not justify allowing Section 22 to become a trap for the unwary claimant who, confident that he has asserted his claim under Section 13(a), relies upon the employer to demand an adjudication if the employer believes that additional delay may be deleterious.[29]

Jones filed his claim under Section 13(a) within a month of his injury. At a hearing held in 1966, neither Jones nor Hartford requested the deputy commissioner to make an award; both parties were content to await further developments. After Hartford ceased paying voluntary compensation, the deputy commissioner adjudicated Jones' claim for the first time, and concluded that he was and is permanently and totally disabled. Hartford was not prejudiced in any way by the delay between the termination of payments and Jones' protest. We submit that the deputy commissioner's award of compensation, to which Jones concededly is entitled on the merits, should be upheld. Nothing in either the words or the history of Section 22, or in the legislative program implemented by the Act, suggests that his claim should be extinguished.

[29] If, as a result of extended and unjustified employee delay in objecting to the termination of payments, an employer or its insurer suffers demonstrable prejudice, a deputy commissioner, or a reviewing court, might be entitled to consider the delay as a good ground to diminish an award. But, as with the doctrine of laches in equitable actions, such diminution would be predicated on actual prejudice, and not merely the running of a specified period of time.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APRIL 1975.

U.S. GOVERNMENT PRINTING OFFICE: 1975

Supreme Court, U. S.
FILED
MAR 29 1975
MICHAEL

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-362

INTERCOUNTY CONSTRUCTION CORP., and
HARTFORD ACCIDENT & INDEMNITY COMPANY,
Petitioners,

v.

NOAH C. A. WALTER, Deputy Commissioner,
U. S. Department of Labor,
Bureau of Employees' Compensation,
and
MARY JONES,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

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48 Stat. 807 23

MISCELLANEOUS:

20 C.F.R. #31.5 (1972) 7, 8, 16

20 C.F.R. #31.12 (1972) 8, 9, 18

20 C.F.R. #31.13 (1972) 9, 10, 18

S.Rep.No. 588, 73d Cong., 2d Sess. April 3, 1934; H.Rep.No. 1244, 73d Cong., 2d Sess., April 16, 1934 23

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-362

INTERCOUNTY CONSTRUCTION CORP., and
HARTFORD ACCIDENT & INDEMNITY COMPANY,
Petitioners,

v.

NOAH C. A. WALTER, Deputy Commissioner,
U. S. Department of Labor,
Bureau of Employees' Compensation,
and
MARY JONES,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

REPLY BRIEF FOR RESPONDENT, MARY JONES

QUESTION PRESENTED

The question is felt to be more specifically stated as:

When an injured claimant[1] has duly filed a claim under #913(a) of the Longshoremen's and Harbor

[1] The injured claimant, Charles E. Jones, is now an adjudicated incompetent, his court appointed guardian being his wife, Mary Jones, the Respondent, and hereafter referred to as the "claimant".

Workers' Compensation Act,[2] as applicable to the District of Columbia, the employer's carrier[3] denies the permanent disability claimed, and the claimant only received compensation for temporary disability under #914(a), (b) and (e) of the Act without the deputy commissioner having ever heard and adjudicated the claim, is the unadjudicated claim for permanent disability barred by #922 of the Act unless an additional claim is filed within one year of the last payment of temporary compensation?

STATUTES AND REGULATIONS INVOLVED

STATUTES: In addition to the statutes cited in the carrier's brief, the following are felt to be relevant:

United States Code, Title 33:

#914. Payment of compensation

(a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer.

(b) The first installment of compensation shall become due on the fourteenth day after the employer has knowledge of the injury or death, on which date all compensation then due shall be paid. Thereafter compensation shall be paid in installments semimonthly, except where the deputy commissioner determines that payment in installments should be made monthly or at some other period.

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[2] The Longshoremen's and Harbor Workers' Compensation Act will hereafter be referred to as the "Act".

[3] The interest of the employer and carrier are the same and will hereafter be referred to as the "carrier".

(c) Upon making the first payment, and upon suspension of payment for any cause, the employer shall immediately notify the deputy commissioner, in accordance with a form prescribed by the Secretary, that payment of compensation has begun or has been suspended, as the case may be.

(d) If the employer controverts the right to compensation he shall file with the deputy commissioner on or before the fourteenth day after he has knowledge of the alleged injury or death, a notice, in accordance with a form prescribed by the Secretary, stating that the right to compensation is controverted, the name of the claimant, the name of the employer, the date of the alleged injury or death, and the grounds upon which the right to compensation is controverted.

(e) If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subdivision (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subdivision (d) of this section, or unless such nonpayment is excused by the deputy commissioner after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

(f) If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 per centum thereof, which shall be paid at the same time as, but in addition to, such compensation, unless review of the compensation order making such award is had as provided in section 921 of this title and an

interlocutory injunction staying payments is allowed by the court as provided therein.

(g) Within sixteen days after final payment of compensation has been made, the employer shall send to the deputy commissioner a notice, in accordance with a form prescribed by the Secretary, stating that such final payment has been made, the total amount of compensation paid, the name of the employee and of any other person to whom compensation has been paid, the date of the injury or death, and the date to which compensation has been paid. If the employer fails to so notify the deputy commissioner within such time the Secretary shall assess against such employer a civil penalty in the amount of $100.

(h) The deputy commissioner (1) may upon his own initiative at any time in a case in which payments are being made without an award, and (2) shall in any case where right to compensation is controverted, or where payments of compensation have been stopped or suspended, upon receipt of notice from any person entitled to compensation, or from the employer, that the right to compensation is controverted or that payments of compensation have been stopped or suspended, make such investigations, cause such medical examinations to be made, or hold hearings, and take such further action as he considers will properly protect the rights of all parties.

. . . .

Mar. 4, 1927, c. 509, #14, 44 Stat. 1432; May 26, 1934, c. 354, #4, 48 Stat. 807; June 25, 1938, c. 685, #7, 52 Stat. 1167; June 24, 1948, c. 623, #5, 62 Stat. 603; July 26, 1956, c. 735, #5, 70 Stat. 655; July 14, 1961, Pub.L. 87-87, #3, 75 Stat. 203.

#919. Procedure in respect of claims

(a) Subject to the provisions of section 913 of this title a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the Secretary at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

. . . .

(c) The deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect of the claim, and upon application of any interested party shall order a hearing thereon. If a hearing on such claim is ordered the deputy commissioner shall give the claimant and other interested parties at least ten days' notice of such hearing, served personally upon the claimant and other interested parties or sent to such claimant and other interested parties by registered mail or by certified mail, and shall within twenty days after such hearing is had, by order, reject the claim or make an award in respect of the claim. If no hearing is ordered within twenty days after notice is given as provided in subdivision (b) of this section, the deputy commissioner shall, by order, reject the claim or make an award in respect of the claim.

(d) At such hearing the claimant and the employer may each present evidence in respect of such claim and may be represented by any person authorized in writing for such purpose.

(e) The order rejecting the claim or making the award (referred to in this chapter as a com-

pensation order) shall be filed in the office of the deputy commissioner, and a copy thereof shall be sent by registered mail or by certified mail to the claimant and to the employer at the last known address of each.

. . . .

Mar. 4, 1927, c. 509, #19, 44 Stat. 1435; June 25, 1938, c. 685, #9, 52 Stat. 1167; June 11, 1960, Pub.L. 86-507, #1(30), (31), 74 Stat. 202.

#920. Presumptions

In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this chapter.

. . . .

Mar. 4, 1927, c. 509, #20, 44 Stat. 1436.

#921. Review of compensation orders

(a) A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 919 of this title, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

. . . .

Mar. 4, 1927, c. 509, #21, 44 Stat. 1436; June 25, 1936, c. 804, 49 Stat. 1921; June 25, 1948, c. 646,

#32(b), 62 Stat. 991; May 24, 1949, c. 139, #127, 63 Stat. 107.

#923. Procedure before the deputy commissioner

(a) In making an investigation or inquiry or conducting a hearing the deputy commissioner shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties. Declarations of a deceased employee concerning the injury in respect of which the investigation or inquiry is being made or the hearing conducted shall be received in evidence and shall, if corroborated by other evidence, be sufficient to establish the injury.

. . . .

Mar. 4, 1927, c. 509, #23, 44 Stat. 1437.

The following regulations of the Bureau of Employees' Compensation are relevant:

20 C.F.R. (1972):

#31.5 Claims for compensation.

A claim for compensation may be filed with the deputy commissioner for the compensation district in which the injury occurred at any time after the first 7 days of disability following any injury, or at any time after death. The right to compensation for disability shall be barred unless a claim therefor is filed within 1 year after the injury, and the right to compensation for death shall be barred unless a claim therefor is filed within 1 year after the death, except that if payment of compensation

has been made without an award on account of such injury or death, a claim may be filed within 1 year after the date of the last payment, and except that where the said act provides for the running of the said year limitation from any other date, the provisions of said act shall apply. For the purpose of filing such claims the Bureau has provided separate forms for use in injury and death cases which shall be furnished to any person desiring to file such a claim, upon application therefor made to such deputy commissioner.

(Sec. 19(a), 44 Stat. 1435; 33 U.S.C. 919(a))

#31.12 Form of compensation orders; service thereof.

(a) Orders adjudicating claims for compensation or suspending payments of compensation shall be designated by the term "compensation order" followed by a descriptive phrase designating the particular type of such order, such as "award of compensation", "rejection of claim", "suspension of compensation", "modification of award". All compensation orders shall contain the name of the Bureau and agency, the designation of the compensation district, the names of the parties in interest, a statement of the basis for the order (that is, whether upon a claim, an application for suspension of compensation, an application for modification of award, etc., with a statement by whom made, and whether a hearing was held or applied for), findings of fact, an award, rejection, or other appropriate paragraph containing the action of the deputy commissioner, and appended thereto shall be a paragraph headed "proof of service", containing the certification of the deputy commissioner that a copy of the compensation order was on a date stated sent by registered mail, with the names and addresses of the parties to whom sent. Compensation orders shall be signed by the deputy commissioner at two places, (1) following the action paragraph, and (2) following the certification under the "proof of service".

(b) Copies of compensation orders shall be served personally or by registered mail upon the claimant, the employer and the insurance carrier at the last known address of each.

#31.13 Contents of findings of fact.

(a) All original compensation orders shall contain, in the paragraph headed "findings of fact", findings with respect to the names and addresses of the parties in interest, the date and place of injury or alleged injury, the circumstances surrounding the accident or alleged accident, the nature and extent of the injury or alleged injury, notice of injury or death, the average weekly wage and such other facts as may be necessary to determine all of the issues raised before the deputy commissioner upon the hearing of the case or otherwise, but in case of rejection of the claim the deputy commissioner may in his discretion omit any finding unnecessary to support such action. In all death cases the dates of birth of each claimant shall be found in the compensation order; in such cases involving aliens, findings with respect to such alienage shall be made. In cases in which the claim is rejected, the ground for such rejection shall be stated in a paragraph following the findings of fact. Where failure to give notice of injury or death is excused pursuant to the provisions of section 12(d) of said act (44 Stat. 1431; 33 U.S.C. 912(d)), the fact of such excuse together with the ground thereof shall be stated in the compensation order.

(b) In compensation orders other than the original order the statement of the basis for the

order shall contain reference to all prior compensation orders with the dates thereof. In such orders the findings of fact shall relate only to the immediate issues before the deputy commissioner, without restatement of facts found in any prior compensation order relating to the same injury or death, unless necessary for the completeness of the compensation order.

(c) Findings of fact shall be stated positively; that is, without equivocation or qualification. All ultimate facts necessary to support the action of the deputy commissioner shall be found. Recitals of evidence, statements of opinion, and citations to authorities shall be avoided in a compensation order.

(d) The findings of fact may contain, in addition to the ultimate facts necessary to support the action of the deputy commissioner upon the issues before him, findings relating to services rendered on behalf of the claimant by his authorized representative, and relating to the approval of bills for medical treatment and other attendance or treatment authorized to be obtained by an employee under the provisions of section 7 of said act. 44 Stat. 1427; 33 U.S.C. 907.

STATEMENT OF THE CASE

The claimant adopts carrier's statement of the case with the following clarifications[4]:

a. (Carrier's 6-7) When the carrier stopped payment of temporary total compensation of $54.00 per week effective 20 April 1965 (App. 8), and thereupon commenced compensation of $27.00 per week for 50%

[4] Reference hereafter to carrier's brief will be "Carrier's (page nr.)".

temporary partial disability (App. 9), the reduction was made by the carrier of its own volition with no adjudication having been made by the deputy commissioner on the claim filed.

b. (Carrier's 7) When the carrier stopped payment of temporary compensation as the maximum allowed therefor by the Act had been paid (App. 12, 14), neither the carrier nor the claimant applied to the deputy commissioner for a hearing and adjudication of the pending claim for permanent disability. Further, the deputy commissioner did not set the claim down for hearing and adjudication as required by #914(h) and #919(a) and (c) of the Act.

c. (Carrier's 8) The carrier states that the deputy commissioner's order of 24 May 1971 (App. 18) rejected claimant's claim for permanent disability as more than one year had elapsed between the date of last compensation payment and "the new claim for permanent total disability advanced by claimant's attorney. (App. 16-20, 29)". The deputy commissioner's order merely states, "that claimant's attorney on February 11, 1970 filed claim for additional compensation based on permanent total disability; . . .". (App. 18 at Paragraph 10) In fact, claimant's letter of 11 February 1970 to the deputy commissioner was a request for hearing on the one and only claim which was filed on 12 August 1960; there was no "new" claim filed. (App. 15 at Paragraph 12; 29)

d. (Carrier's 8) When claimant filed suit in the district court to set aside the deputy commissioner's first order of 24 May 1971, the carrier was not made a party to the action. In like manner, when the carrier

filed suit in the district court to enjoin enforcement of the deputy commissioner's second order dated 8 February 1972 after remand, the claimant was not made a party to the action. (App. 25)

e. (Carrier's 9) The United States Court of Appeals did not hold "that the time limitation provisions" of the Act did not bar the claimant's claim as such. Rather, the court held that the specific time limitation in #922 of the Act was not applicable to bar a pending claim filed under #913(a) which was still awaiting adjudication, by the deputy commissioner and rejected the 5th Circuit's conclusion to the opposite in *Strachan Shipping Company v. Hollis,* 460 F.2d 1108 (5th Cir. 1972) *cert. denied,* 409 U.S. 887 (1972). (App. 34-37) In addition to the time limitation in #922 of the Act, there are other time limitations in the Act, e.g., #913, time for filing claims, and #921(a), time limitation as to review of compensation orders.

ARGUMENT

1. APPLICATION OF GENERAL RULES OF CONSTRUCTION.

The carrier contends that the plain language of #922 bars the claimant. This "plain language" is arrived at by construing the wording of the section by itself, and not in its relationship with the Act as a whole. The court of appeals below found the same section, when so construed, to be ambiguous. The court properly turned to other sources to determine whether Congress intended the time limitation in #922 to apply to cases in which no final order was made. (App. 31-32) As to the issue, "cases in which no final order was made" means a timely claim for permanent disability has been

filed by the claimant under #913(a), over a year has expired since the carrier made a payment of compensation for temporary disability, and the claim remains pending never having been adjudicated by the deputy commissioner. In turning to these other sources, as the legislative history of #922, available case law on the issue, and consideration of the Act as a whole with its implementing regulations, it first is necessary to determine the nature of the Act as a whole to secure guidance in the construction of its several parts.

The Act has been before this court before, and this court has declared the general rule of construction that it is to enjoy. In construing the computation of temporary and permanent disability compensation under the Act, this court stated in *Baltimore and Philadelphia Steamboat Company v. Norton,* 284 U.S.408, 414 (1932):

> "The measure before us, like recent similar legislation in many States, requires employers to make payments for the relief of employees and their dependents who sustain loss as a result of personal injuries and deaths occurring in the course of their work whether with or without fault attributable to employers. Such laws operate to relieve persons suffering such misfortunes of a part of the burden and to distribute it to the industries and mediately to those served by them. They are deemed to be in the public interest and should be construed liberally in furtherance of the purpose for which they were enacted and, if possible, so as to avoid incongruous or harsh results."

The court has adhered to this liberal rule of construction as to the requirement under the Act that notice of an employee's injury be given to the employer, for the court would not allow the employer to ignore the notice

of its responsible agents at the job site though the employer's representative in charge of the job site may not have been informed. *Voris v. Eikel,* 346 U.S. 328, 333 (1953). In a like manner, this court has construed the Act liberally to afford protection to a longshoreman by holding that the Act would not proscribe an injured longshoreman to recover from a bareboat charterer or a shipowner. *Reed v. The Yaka,* 373 U.S. 410 (1963) and *Jackson v. Lykes Bros. Steamship Co., Inc.,* 386 U.S. 731 (1967). Alternatively, the court recognizing that this is a humanitarian act and should be construed liberally to effectuate its purposes, as held in a six to three decision that it could not by construction in effect rewrite #913(a) of the Act so that "injury" meant "disability". *Pillsbury v. United Engineering Company,* 342 U.S. 197, 200 (1952). Thus, the court majority in that case would not so construe #913(a) so as to extend the liability of the employer and its insurer into the indefinite future where no claim had been filed within one year of the injury itself. This general rule of liberal construction to favor the injured employee is reinforced by the Act itself, as in #920(a), that it shall be presumed in absence of substantial evidence to the contrary that a claim comes within the provisions of the Act; and, as in #923(a), that the deputy commissioner is not to be bound by common law or statutory rules of evidence or by technical or formal rules of procedure except as provided in the Act itself, and that investigations or inquiries shall be made and the hearings conducted in such a manner as to best ascertain the rights of the parties.

2. COMPARISON OF #922 WITH OTHER STATUTORY PROVISIONS OF THE ACT AND IMPLEMENTING REGULATIONS.

Next, to construe #922 and to determine its applicability to the facts in claimant's case, comparison should be made to the other provisions of the Act and its implementing regulations.

The section requiring the timely filing of a claim by an injured employee is #913(a) of the Act. Its pertinent wording here is:

> "#913. Time for filing claims
>
> "(a) The right to compensation for disability under this chapter shall be barred unless a claim therefor is filed one year after the injury, . . . except that if payment of compensation has been made without an award on account of such injury . . . a claim may be filed within one year after the date of last payment . . . ."

The language mandating that when a claim must be filed on penalty of the right to compensation for disability being barred is in the alternative. If a claim is not filed within a year of the injury, the alternative is that the claim must be filed within a year of the last compensation made *without an award on account of such injury*. The time periods for filing this claim are not in any way in the disjunctive, that is, a claim must be filed within one year of the injury, but if compensation has been made without an award then in that event another claim must be filed within one year of this payment. Further, there is no language in #913(a) (or in #922 for that matter) that states that such a claim filed is subject to any provisions of #922. In the

claimant's case, the fact is that his claim for permanent disability was timely filed within one year of his injury. (App. 3) The implementing regulations of the Bureau of Employees' Compensation are drawn to a like effect. 20 C.F.R. #31.5 (1972).

The facts in the claimant's case also show that the carrier controverted claimant's right to temporary total disability on 6 January 1965 (App. 7); that effective 21 April 1965 it reduced temporary total disability compensation to 50% temporary disability (App. 9); and, that on 23 January 1968 it terminated all temporary disability compensation as the then statutory maximum of $17,280.00 for temporary disability compensation had been paid (App. 12). In light of these facts, examination must be made of any statutory provisions that may require action by the deputy commissioner. The applicable provisions are:

"#914. Payment of compensation

. . . .

"(h) The deputy commissioner (1) may upon his own initiative at any time in a case in which payments are being made without an award, and (2) shall in any case where right to compensation is controverted, or where payments of compensation have been stopped or suspended, upon receipt of notice from any person entitled to compensation, or from the employer, that the right to compensation is controverted, or that payments of compensation have been stopped or suspended, make such investigations, cause such medical examinations to be made, or hold such hearings, and take such further action as he considers will properly protect the rights of all parties."

. . . .

"#919. Procedure in respect of claims

"(a) Subject to the provisions of section 913 of this title a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the Secretary at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

. . . .

"(c) The deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect of the claim, and upon application of any interested party shall order a hearing thereon. If a hearing on such claim is ordered the deputy commissioner shall give the claimant and other interested parties at least ten days' notice of such hearing, served personally upon the claimant and other interested parties or sent to such claimant and other interested parties by registered mail or by certified mail, and shall within twenty days after such hearing is had, by order, reject the claim or make an award in respect of the claim. If no hearing is ordered within twenty days after notice is given as provided in subdivision (b) of this section, the deputy commissioner shall, by order, reject the claim or make an award in respect of the claim.

"(d) At such hearing the claimant and the employer may each present evidence in respect of such claim and may be represented by any person authorized in writing for such purpose.

"(e) The order rejecting the claim or making the award (referred to in this chapter as a com-

pensation order) shall be filed in the office of the deputy commissioner, and a copy thereof shall be sent by registered mail or by certified mail to the claimant and to the employer at the last known address of each."

. . . .

The above provisions placed a clear duty upon the deputy commissioner to take action to properly protect the rights of all parties. Section 919(a) is clear that the deputy commissioner was vested with full power and authority to hear and determine all questions as to a claim filed under the provisions of #913(a). Again, as discussed in the examination of #913(a), above, there is no language in #919(a) that the deputy commissioner's power and authority is subject to any precedent exceptions or limitations by #922 prior to such hearing and determination. See also 20 C.F.R. #31.12 and #31.13 (1972) as to the form of compensation orders, and contents of findings of fact. The facts in claimant's case show that the deputy commissioner did not act to hear and determine his claim for permanent disability, filed under #913(a), until application therefor was made by claimant's counsel on 11 February 1970, whereupon the hearings and orders by the deputy commissioner here in issue were made. (App. 15, 16-20, 21-24, 29). In like manner, the claim never having been adjudicated, the carrier had an equal right at any time to itself apply to the deputy commissioner under #919(c) in order to assure itself by its "voluntary execution" of the Act to "properly protect the rights of all the parties" under #914(h). For some reason, the carrier did not pursue the matter in spite of its declared adherence to voluntary execution of the Act.

Up to this point, there is nothing to be shown that the deputy commissioner's power and authority to hear and determine claimant's claim was not continuing and effective when the hearings were held. However, the carrier states that the plain language, much less the legislative history, of #922 barred the deputy commissioner from hearing the claim. This section reads:

"#922. Modification of awards

Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the Secretary."

As to its language, the section title specifies that it is applicable to "modification" of awards. As #919(a) declares that the deputy commissioner has full power and authority in the first instance to hear and determine all questions in respect of a claim, the deputy commissioner need not look to #922 to hold a hearing and by his order reject the claim or make an award as to the claim filed under #913(a).

Likewise, the wording "on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner" must, if the section title is to have any applicability, refer to a "modification" of a prior order by the deputy commissioner. The court of appeals said the wording as to a mistake in determination of fact implied reference to a prior order having been entered as to a claim, for findings of fact are only required in a compensation order. (App. 31-32) The court stated, however, that the wording "a change of conditions" was ambiguous because this change may refer to conditions found by the deputy commissioner in a prior order or which existed when payments were made without an order. (App. 32) Yet, if #919(a), (c)-(e), are to be given any effect, any change of conditions or mistake in determination of fact by the deputy commissioner must be as to a prior formal hearing and an order of the deputy commissioner thereon either rejecting the claim or making an award of compensation, for indeed, until this order is issued under #919(a) and (c), the deputy commissioner had the power and authority to determine the matter, and there would be nothing to modify or upon which the power in #922 could act.

Additionally, the language in #922, stating that the deputy commissioner may "review" a compensation case, "issue a new compensation order", and that "such new compensation order shall not affect any compensation previously paid", is all language in reference to an order having been theretofore made. As stated above, such an order could only have been issued under the power and authority given the deputy commissioner under #919(a) as to a claim filed under #913(a).

Thus, we are now brought to the only words in #922, which taken by themselves, would imply that all of the above is to the contrary notwithstanding, for the time limitation is to apply "whether or not a compensation order has been issued", and thus the claimant's claim filed 18 August 1960 is time-barred as another claim was not filed within one year of the last payment of temporary compensation on 23 January 1968. (App. 3, 12). In other words, the carrier's contention is that under #922 the claimant had to file another claim before 23 January 1969. The obvious effect is, as seen from construing the several applicable sections of the Act as a whole, to place #922 at war with the other sections: A claim filed under #913(a) as required to establish a right to compensation under the Act in the first instance is circumvented by so-called "voluntary" payment or execution of the Act under #914(a)-(g) (which coerces the "voluntary" execution); the deputy commissioner's action to protect the rights of all parties required under #914(h) is avoided (though the carrier itself can apply for a hearing); and, the power and authority of the deputy commissioner under #919(a) and (c) to hear and determine all questions in respect of a claim filed under #913(a) has been negated. "Nothing less than compelling language would justify

such construction of the Act" which is to be construed liberally, ". . . and, if possible, so as to avoid incongruous or harsh results." *Baltimore and Philadelphia Steamboat Company v. Norton, supra,* at 413-414.

3. HISTORY OF #922.

To construe #922 by itself, necessarily reference must be had to its legislative history. Even this history, however, is not in a vacuum but must be in reference to the Act as a whole and its purpose. Initially, the section read as follows:

> "Sec. 22. Upon his own initiative, or upon application of any party in interest, on the ground of a change in conditions, the deputy commissioner may at any time during the term of an award and after the compensation order in respect of such award has become final, review such order in accordance with the procedure prescribed in respect of claims in section 19, and in accordance with such section issue a new compensation order which may terminate, continue, increase, or decrease such compensation. Such new order shall not affect any compensation paid under authority of the prior order."
>
> Mar. 4, 1927, c. 509, #22, 44 Stat. 1437.

It was found that this wording frequently precluded modification of an award where the deputy commissioner's order was entered after the term of the award had expired. (App. 32, 33) Suffice it to say that the wording was then clear that modification could only apply where a prior compensation order had been entered.

In 1934 the section was amended so as to read as follows:

> "Sec. 22. Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, review a compensation case in accordance with the procedure prescribed in respect of claims in section 19, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the commission."
>
> May 26, 1934, c. 354, #5, 48 Stat. 807.

The House and Senate reports as to the above amendment read as follows:

> "Section 5 of H.R. 8057 (S.2794) amends section 22 of the existing act so as to broaden the grounds on which a deputy commissioner can modify an award and also while strictly limiting the period, extends the time within which such modification

may be made. The Commission in its Seventeenth Annual Report (p. 18) states:

> Section 22 of the Longshoremen's Act provides for a reconsideration or review by him (a deputy commissioner) of his action with less authority to do justice to the parties than is contained in any provision for a similar purpose in any State-compensation law. A review now authorized 'during the term of an award' is not sufficient in the interest of justice. In many cases the 'term of award' has ended when the compensation order is issued.

The amendment is in line with the recommendation of the Commission except that it limits to one year after the date of the last payment of compensation the time during which such modification may be made."

S.Rep.No. 588, 73rd Cong., 2d Sess. April 3, 1934; H.Rep.No. 1244, 73d Cong., 2d Sess. April 16, 1934.

The wording of the committee reports is clear that modification to be allowed is only as to an award by a deputy commissioner. This is further clarified by the amendment itself still continuing the use of language "issue a new compensation order" and "such new order" as had theretofore existed in the section. (App. 33) The committee reports made reference to the deputy commissioner being limited to making a modification of an award only during the term of the award, and the language "whether or not a compensation order was issued" was to clarify that under the amendment that the deputy commissioner could modify an award whether or not payment to a claimant had stopped before or after the order concerned had been entered. There is no showing in carrier's brief (pages 17-21) that the foregoing language is not used in this context. To bring the

section to its current wording, the section was amended in 1938 to clarify and permit the deputy commissioner to modify an order rejecting a claim. The court of appeals again stressed that the house committee report as to this amendment stated that the modification to be allowed was as to compensation cases wherein an order had been entered by the deputy commissioner. (App. 34)

As to the interpretation of the wording in question, the carrier [as did the district court in *Strachan* at 323 F.Supp. 1123, 1124 (S.D. Tex. 1970)] cites *American Mut. Liability Ins. Co. of Boston v. Lowe,* 85 F.2d 625 (3d Cir. 1936), for the proposition that the time limitation in #922 applies whether or not a compensation order has issued. In fact, the 3d Circuit held that the deputy commissioner had never issued an order as required by #919(e) (and therefore the jurisdiction of the deputy commissioner continued). The court then proceeded *en arguendo* as to the insurer's contention, that if it held the deputy commissioner's memorandum to be a formal order (which it did not), the deputy commissioner could nevertheless hold a hearing and modify said order based on #922 as was initially promulgated in 1927; that as to the 1934 amendment, the proceedings were still pending; and, that even if the 1934 amendment applied, the deputy commissioner could issue his order following the one year limitation period. The argument was *dicta*. If otherwise it should not be followed.

Finally, in considering the legislative history of #922, this court recently had the same section before it for construction in a case also from the 5th Circuit, see *O'Keefe v. Aerojet-General Shipyards, Inc.,* 404 U.S. 254 (1971). In this case, where the claimant had peti-

tioned for review of an order rejecting his claim for compensation, the deputy commissioner found contrary to his initial order and awarded compensation, which order was sustained by the district court. The 5th Circuit reversed on the grounds that there was no new evidence clearly demonstrating mistake; therefore, the deputy commissioner did not have the jurisdiction to receive additional but cumulative evidence and change his mind. This court stated that neither the wording of the statute nor its legislative history would support such a narrowly technical and impractical construction. In discussing the history of #922, this court referred to the same house and senate committee reports as to the 1934 amendment as basis for the congressional intent to broaden the deputy commissioner's grounds to modify an award. The context of the court's discussion on modification is as to a prior order issued by the deputy commissioner. In like manner, it is submitted that the position of the carrier and the 5th Circuit in *Strachan, supra*, is a narrowly technical and impractical construction, and is a construction again attempting to restrict the scope of the deputy commissioner's review. Such a position precludes the deputy commissioner from adjudicating a claim filed under #913(a) and is in derogation of the deputy commissioner's power and authority to hear and determine the claim under #919(a). Having evaded this adjudication, then the carrier would evade the deputy commissioner's review under the one-year limitation in #922.

4. THE VALIDITY OF THE STRACHAN CASE.

The reasoning of the 5th Circuit in the *Strachan* case, *supra,* should be rejected. The effect of this decision rejects the long standing rational interpretation by the agency charged with the Act's administra-

tion, *Strachan, supra,* Ainsworth, J. dissenting at 460 F.2d 1116-1120. The construction given the Act by the Bureau of Employees' Compensation in *Strachan,* and by the respondents here should be deferred to and sustained. *Udall v. Tallman,* 380 U.S. 1, 16 (1965). The effect of *Strachan, supra,* and the position of the carrier is to nullify the power and authority of the deputy commissioner under #919(a) to hear and determine all questions as to a claim filed under #913(a); requires a claimant to re-file claims within each year wherein compensation has been paid without an award so as not to be time-barred (though a timely-filed claim under #913(a) has not been adjudicated by the deputy commissioner); and, is an attempt to restrict the deputy commissioner's scope of review under #922. As the Act is to be construed liberally in furtherance of its humanitarian purpose, such a narrowly technical and impractical construction resulting in incongruous and harsh results upon an injured claimant should be firmly rejected. *Baltimore and Philadelphia Steamboat Company v. Norton, Voris v. Eikel, Reed v. The Yaka, Jackson v. Lykes Bros. Steamship Co., Inc., Pillsbury v. United Engineering Company,* and *O'Keefe v. Aerojet-General Shipyards, Inc., supra.* The carrier makes much of the self-executing provisions of the Act and that employers and their insurers should not be penalized by their "voluntary" action. However, having knowledge that the claim filed under #913(a) has never been adjudicated, the carrier can by its voluntary action request a hearing so that the extent of its liability *vel non* can be adjudicated. #919(c); *cf. Atlantic & Gulf Stevedores, Inc. v. Donovan,* 274 F.2d 794 (5th Cir. 1960). Further, there is no room for the argument in *Strachan, supra,* that it is inequitable to simultaneously endorse "voluntary compliance" with the Act by employers and their

insurers and at the same time approve the deputy commissioner's failure to terminate compensation cases. As stated, the carrier here and in *Strachan, supra*, were free to act but did not do so. The carrier cannot shift its cost because of administrative delay onto the less fortunate claimant. *N.L.R.B. v. Electric Vacuum Cleaner Company, Inc.*, 315 U.S. 685 (1942); *NLRB v. J. H. Rutter-Rex Manufacturing Co., Inc.*, 396 U.S. 258 (1969). Accordingly, the carrier's reference in its brief (p. 25-26) to the Bureau's statistical accounting and the thousands of cases that could be "opened" has no standing. The fact that very few claims are formally heard and adjudicated merely substantiates that the self-executing provisions of the Act have been efficient, except, of course, in a small number of cases as with the claimant here.

It was the claimant's position in his brief in opposition to the petition for writ of certiorari being heard that the *Strachan* case, *supra,* could be distinguished, and thus distinguished, there was no conflict in circuit opinions on the issue. The court deciding to hear the matter, for all the reasons above, the position of the carrier in this case and the reasoning in *Strachan* should be rejected. The fact that there are unreported cases holding as in *Strachan* referred to in carrier's brief (page 24) does not give credence to the carrier's position and to *Strachan* - if anything, it stresses the necessity to reject the carrier's position and the reasoning in *Strachan*.

CONCLUSION

Accordingly, it is respectfully submitted that the judgment of the court of appeals below should be affirmed.

Respectfully submitted,

/s/ J. de R. Capps

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-362

INTERCOUNTY CONSTRUCTION CORP., and

HARTFORD ACCIDENT & INDEMNITY COMPANY,

Petitioners,

v.

NOAH C. A. WALTER, Deputy Commissioner,

U.S. DEPARTMENT OF LABOR

Bureau of Employees Compensation

and

MARY JONES,

Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of March, 1975, copies of the Reply Brief for Respondent were airmailed with airmail postage prepaid, to the Solicitor General of the Department of Justice, Washington, D.C. 20530, and Joshua T. Gillellan, II, Esq., Room N 2716, New Labor Building, Department of Labor Office, 200 Constitution Avenue, Washington, D.C. 20210; and to John C. Duncan, III, Suite 1010, 1000 Connecticut Avenue, N.W., Washington, D.C. 20036, attorney for Petitioners, Intercounty Construction Corp. and Hartford Accident & Indemnity Company. I further certify that all parties required to be served have been served.

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